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CASES.

THE AMERICAN LAW TIMES.

MARCH, 1873.

A GREAT deal of unnecessary and groundless concern has been manifested by the press and public about the recent decisions of the Supreme Court of the United States in what are popularly known as the "New Orleans Slaughter-house Case" and "Mrs. Bradwell's Appeal."

The former has been before the profession for many months, and the doctrines announced in an opinion by Mr. Justice BRADLEY while on the circuit, which was printed in a majority of our legal contemporaries, were generally received as a correct interpretation of the law growing out of the thirteenth, fourteenth and fifteenth amendments, upon which the action was based. The effect of this opinion was to give to the amendment a sweeping operation by which almost every invasion of private rights could be redressed in the Federal courts. It tended to destroy the principle of State citizenship by enlarging the principle of United States citizenship; and by practically ignoring history, uncertain language was expanded so as to make that which was designed to be in some sense special, general and truly organic. Organic it is, but according to the appellate court specially organic, so to speak. It controls all the forces of government to the end that a single force may not be inoperative. It is active in one direction and passive in others.

The facts in the New Orleans case were substantially as follows: The legislature of Louisiana, believing it to be necessary for the health of the city of New Orleans, incorporated a company to which was given the exclusive right to slaughter cattle in said city for a period of years. The plaintiffs attacked the character of this company, alleging the unconstitutionality of the act of incorporation in that, *inter alia*, it created "involuntary servitude," "abridged the privileges and immunities of citizens of the United States," and "denied to citizens of the United States the equal protection of the laws."

The cause, supported by the opinion of Judge BRADLEY, came to the Supreme Court, where it was twice argued by lawyers of national reputation. The conclusion reached by a majority of the court was, in brief, that the State had authority over its citizens as *citizens of the State*, and that as long as it did not abridge the rights of such citizens as *citizens of the United States*, there was no infraction of the Federal constitution; that the act in question did not affect the plaintiffs as citizens of the United States, and, being within the recognized power of the legislature, was valid.

Mrs. BRADWELL'S case was very similar in principle to the foregoing, and was in some respects quite as well founded. She was refused admission to the bar of a State Supreme Court upon the ground that the State constitution inhibited it. Relying upon a plausible construction of the amendments above alluded to, she claimed, as a citizen of the United States, the "privilege" of every other citizen. The logic of the more conspicuous case, however, was decisive in the premises, and the lower court was sustained.

An examination of the two adjudications will show that they have practically but little significance except as settling the doubt that existed as to

the operation of the amendments considered. We do not believe it was ever, in the language of an eminent jurist, "a well-considered doubt," except among those who doubt from choice. The real gist of the decisions is thus stated by a contemporary with great good sense:

Held, that the thirteenth, fourteenth and fifteenth amendments to the Constitution of the United States, abolishing negro slavery, and the power of the States to make distinctions or discriminations between the civil rights of negroes and whites, do not restrict the right of States to regulate the slaughtering of cattle within their limits, nor abolish the jurisdiction of State governments over their citizens, and transfer it to the United States, nor entitle female citizens of the United States, as such, to practise law in State courts.

SUPREME COURT OF PENNSYLVANIA.

[Nisi Prius. March, 1873.]

LIABILITY OF BAILEE FOR SAFE KEEPING OF COUPON BONDS.

SCULL v. *THE KENSINGTON NATIONAL BANK.*

Judge Williams delivered the following charge to the jury:

Gentlemen of the jury, I have to apologize to you for the charge which I shall deliver to you in this case; it has been written under a great pressure of other duties, and I have had no time to condense it.

This is an action brought by David Scull, against the Kensington National Bank of Philadelphia, to recover the value of thirty United States "Five-Twenty" six per cent. coupon bonds, of the denomination of one thousand dollars each, deposited by the plaintiff in the bank for safe keeping, and which, it is alleged, were wholly lost to the plaintiff by the carelessness, negligence and default of the defendant in not safely and securely keeping the same.

The defence set up by the bank is, that the bonds were not lost by any negligence or want of proper care in keeping them, but that they were stolen by robbers, who broke into the vault of the bank in which they were deposited, and robbed it of its contents, including the plaintiff's deposit among others, without any negligence or default for which the defendant is responsible.

The facts of the case which the evidence tends to establish, so far as it is material to state them, are briefly these: The plaintiff had been a depositor of money in the bank from 1833 or 1834, while it was a State bank, and after it became a National institution, and in 1865 or 1866 he obtained from Mr. McConnell, the cashier, the privilege of depositing a tin box, containing United States bonds, in the vault, for safe keeping, without informing him of the nature or value of the contents, and without paying or agreeing to pay the bank anything for the privilege. At the instance of the cashier he had his name put on the end of the box, so that it could be readily identified and taken from the shelf when he called for it. He was in the habit of getting the box from time to time of the cashier, as the

coupons became due, taking it to his counting-room, and after cutting off the coupons, returning it to the bank for safe keeping. The last time that he obtained the box for this purpose was on the 17th of January, 1871, when he took it to his counting-room and cut off the coupons from the thirty bonds which it contained, each of the value or denomination of $1,000, and having replaced the bonds in the box and locked it up, he delivered it to the cashier to be deposited in the vault, and it was accordingly placed on the shelf inside of the vault by the cashier.

On the night of the 2d of February thereafter, the vault of the bank was broken open by robbers, and the tin boxes which were there on special deposit, including the plaintiff's, were taken out, broken open and robbed of their contents. The robbery, if not a bold one, seems to have been skilfully and adroitly planned and executed. Instead of breaking into the bank by force or violence, the robbers obtained admission by artifice and stratagem.

It would seem that they had learned in some way that the bank was guarded at night by watchmen, and that the name of one of the watchmen was Holmes. During the afternoon of the 2d of February, after the bank was closed, one of their number, dressed in clothes resembling those worn by the city police, called at the bank and, after rapping on the door and inquiring for Mr. Holmes, stated that he had an important message from the lieutenant of the police which he wished to communicate. Mr. Holmes thereupon opened the door, when he said to him, in substance, that Lieutenant Clark had sent him down to tell him to be on his guard, that suspicious characters were about, and that an attempt would probably be made to rob the bank. Mr. Holmes told him that the cashier was in his room, and that he had better go and inform him, and he did so. Neither the watchman nor the cashier seem to have had any suspicion of the real character of the pretended messenger, or to have doubted that he was a member of the police, sent by Lieutenant Clark to inform them of the intended robbery. As the cashier was leaving the bank, he asked Holmes if their arms were loaded and in order, and was informed that they were. He told him not to let any one in, and if any person attempted to break in to shoot him down. When Murphy, the other watchman, came to the bank, he was informed by Holmes of the message which had been communicated by the policeman sent by (as was supposed) Lieutenant Clark.

In a short time, about half-past seven or eight o'clock, a rap on the door of the bank was heard, and as Murphy went to the door a voice from the outside inquired for Holmes. Murphy replied, "he is in the bank," and Holmes saying "that must be the policeman," Murphy opened the door and let him in, with two others in citizen's dress. They inquired of the watchmen if they had any weapons, and were prepared to defend the bank if an attempt should be made to rob it, and were told by the watchmen that they were, and were pointed to the loaded weapons lying in readiness on the table. They told the watchmen that they had seen two suspicious-looking men on or near the corner as they came along, and they proposed that Murphy should go out with one of them and see these men, so that he would know and be able to identify them in case they attempted to break into the bank. Accordingly, Murphy went out with one of the men in citizen's dress, leaving the others in the bank with Holmes.

After they had gone out, the man in police clothes said he was thirsty, and asked for a drink of water, and Holmes, saying that he would get him a drink, started for the hydrant in the corner of the building, both of the men following him. Just as he was in the act of drawing the water, one of them seized him around the body, and the other attempted to get hold of his legs, when a severe struggle ensued. After a time they succeeded in getting the watchman down, and in handcuffing and tying his legs and feet together, and gagging him with a rope. They then left him and went to the door of the bank, and when Murphy and the man that accompanied him returned, they let them in, and as soon as Murphy was inside of the door they seized and struck him, and after a brief resistance succeeded in overpowering him, handcuffing his hands behind his back, tying his legs and feet together, and gagging him, and then they carried him into the cashier's room and set him down in a chair. They then carried Holmes into the same room and laid him down on his back, with his feet tied together, and his hands handcuffed behind him, and one of the men stood over them with a pistol, threatening to shoot them if they attempted to make a noise or get away. The others commenced breaking into the vault. They were joined by two other persons whom they let in, and in the course of two or three hours, more or less, they succeeded in removing the outside door of the vault, breaking the inside door, and effecting an entrance into the vault. They attempted to break open a Lilly safe that was in the vault, in which the money and securities of the bank were kept, but they failed in the attempt. They then took out the tin boxes deposited in the vault, broke them open and robbed them of their contents, taking with them United States bonds and other securities amounting in value from $90,000 to $110,000. Soon after the robbers had left the bank, the watchmen succeeded each in untying the legs of the other; and one of them, Murphy, handcuffed as he was, with his hands behind him, opened the door of the bank and made his way to a tavern across the street and gave the alarm. Mr. Wilson, the landlord, was aroused and came over to the bank, and went for some one to remove the handcuffs from the watchmen. But it was found impossible to remove the handcuffs, and they had to be filed off. The cashier was sent for, and when he came, he found the bank in the condition in which the robbers left it, with the vault broken open, the boxes which had been deposited in it for safe keeping lying on the floor, broken open and plundered of their contents. The bank offered a reward for the apprehension and conviction of the robbers, but, so far as appears, no clue or trace of them has yet been found or discovered.

Is the bank then liable for the loss occasioned to the plaintiff by the robbery? This depends upon the nature and extent of the liability which the bank assumed in accepting the deposit, and the degree of care and diligence which it was bound to exercise in its safe keeping. What then was the real nature and character of the undertaking, and what duty did it impose on the bank? The box was delivered to the cashier to be deposited in the vault of the bank, on one of its shelves. It was a naked bailment of the box to be kept for the plaintiff without reward or compensation. The obligation which such a bailment imposes on the depositary, is that he shall keep the deposit with reasonable care and restore it upon request to the depositor. But what is reasonable care? Being a bailee without

reward, the depositary, it is said, is bound to slight diligence only, and, therefore, is not answerable except for gross neglect. But good faith requires that he should take reasonable care of the deposit; and what is reasonable care must materially depend upon the nature, value and quality of the thing, and the circumstances under which it is deposited, and upon the character and confidence and particular dealings of the parties. He is bound to exercise a degree of care proportioned to the nature and value of the article, the dangers of loss and the temptation to theft; and if he takes the same care of the goods bailed as of his own, that will ordinarily repel the presumption of gross negligence. But if he has kept the deposit in the same place and with the same care that he has kept his own property of a like kind, that will not exempt him from liability for gross negligence. He may be guilty of gross negligence if he omits those precautions which persons of common care and intelligence would naturally adopt, although he may ordinarily omit them in the case of his own property.

It is no defence to a depositary that he has acted in good faith, if, in truth, he has been guilty of gross negligence. Every depositary must be presumed to undertake for reasonable care, with reference to the nature of the things bailed; and where from their nature and value, and the ease and facility with which they may be purloined and secreted, the temptation to theft is great, in such cases anything short of a high degree of care may amount to gross negligence. Where the depositary has taken the same care of the bailor's moneys or other valuables as of his own, and they are lost or stolen, his liability will depend upon the fact whether he has taken such care of them as a reasonable man would ordinarily take of his own property. (*Lancaster County National Bank* v. *Smith*, 12 P. F. Smith, 47.)

Undoubtedly a depositary is guilty of gross neglect if he fails to exercise that care which every man of common sense under the circumstances takes of his own property. Theft is not, in and of itself, evidence of negligence; the greatest vigilance will not always guard against it. Whether it is a valid defence or not, depends upon the particular circumstances of the case, the nature of the bailment and the responsibility attached thereto. These matters are all to be considered and weighed in determining whether there has or has not been a due degree of care used. If there has been a want of reasonable and proper care under the circumstances, the bailee will be responsible for a loss occasioned by theft; but if there has been no want of reasonable care, he will not be liable.

The bank, in undertaking the deposit in this case, did not undertake to keep it safely, but to keep it as it kept its own property of a like character and value; and it discharged its whole duty if it kept it locked up in the vault where it was intended to be kept, and if it did not permit the vault to be broken into and robbed, by its want of reasonable and proper care; in other words, by its culpable negligence. If it had undertaken to keep the deposit safely at all events and under all circumstances, then it would be responsible if it was stolen by its own servants or by strangers; but it was delivered, as we have seen, to the bank to be kept as it would keep its own property; and if it was stolen without any default or negligence on its part, the bank is not responsible for its loss. The bank, as has been said, was bound to keep the deposit with reasonable diligence, but diligence is a relative term; what would amount to requisite and due diligence at one

time and in one situation and under one set of circumstanees, would not amount to it in another. The measure of diligence is regulated in a greater or less degree by the nature and quality of the thing bailed, and by the understanding and practice of the city or the place where the deposit or bailment is made. The liability of a corporation as bailee is like that of a natural person, to be determined by the nature of the bailment, the degree of eare required from it, and the degree of care or diligenee used in the case of special deposit, from which it receives no profit whatever, but which is merely for accommodation of the bailor. The bank is liable only for gross neglect, and what amounts to such neglect depends, as we have already said, upon the particular circumstances of the case.

These are the well settled principles of law applicable to gratuitous bailments, by which the rights and liabilities of the parties in this ease are to be determined. There is nothing new in any of them. They have been expressed almost in the very language of the authorities.

Was the bank, then, guilty of such negligence as will render them responsible for the loss of which the plaintiff complains? Did it fail to exereise reasonable and proper care, in order to prevent the robbery, and secure the safe keeping of the plaintiff's box and its eontents?

It is intimated, though not directly or positively asserted, that the bank was guilty of negligence in not depositing the plaintiff's box in the Lilly safe, in which its own moneys and securities were kept. But it was no part of the eontraet or undertaking of the bank to deposit it in the safe; the understanding of the bank was that it would keep it in the vault, on one of the shelves; and the plaintiff must have so understood it, for he testifies, "I asked the cashier if I could deposit the box for safe keeping; he said 'yes,' and then told me to put my name on the end of it, so that it would be handy to get off the shelf."

But it is contended the bank was guilty of negligence, because the vault was insecure and insufficient for the safe keeping of the deposits placed and kept therein. But the bank in accepting the plaintiff's deposit did not undertake for the suffieiency and security of the vault. If the bank had represented that the vault was safe and secure, and sufficient for the safe keeping of the deposits, and had thereby induced the plaintiff to deposit his box therein, a different question would arise, and the bank might be liable for the loss, if it was occasioned by the insecurity and insufficiency of the vault. All that the bank impliedly undertook in aecepting the deposit was to keep it in the vault in the condition it then was, and if it was unsafe or insecure as a place of deposit in its then condition, it was the plaintiff's folly or misfortune to plaee his property in it.

It is also contended that it was the duty of the bank to have open glass windows, and to keep a light burning in the bank, so that persons on the outside could see if there was anything wrong going on therein, if the vault could be seen from the street. No expert or other witness has testified that it was an act of negligence not to have open glass windows and a light burning at night in the bank, or that it is the custom in any of the banks or stores of the city to have open windows and a light burning where two watchmen are employed within the building to watch and prevent its being entered and robbed by thieves or burglars.

It seems to me that the evidence wholly fails to show any sueh negligence

in this respect as would render the bank liable for the loss occasioned by the robbery.

It was undoubtedly the duty of the bank to see that the doors of the vault and bank were securely closed and locked, or otherwise fastened by bars and bolts; and if watchmen were necessary for the safety of the bank, it was its duty to employ them. If reasonable and proper care of the money and securities of the bank and its depositors required the employment of watchmen in the bank, then it would have been gross negligence to omit the duty. But I do not see that it was negligence to allow one of the watchmen to make or mend shoes while engaged in watching the bank. No witness has been called to testify, either an expert or not, that it was an act of negligence on the part of the bank; on the contrary, one of the directors has testified that it was better that the watchman should have something to do in order to keep him awake, rather than to put him in a warm room with nothing to do, and where he would be more likely to fall asleep; besides, he was not making shoes when the robbers entered the bank and broke into the vault, so that that was not a cause of the robbery. And again it is urged that the cashier was guilty of negligence in not adopting extra precautions to guard against the robbery, after receiving notice that an attempt would be made to rob the bank. Whether he was guilty of negligence or not, depends upon the sufficiency of the precautions which had been made. If they were reasonably sufficient to ward off and prevent the success of the threatened attempt, then he was guilty of no negligence; if the watchmen were well armed and able to keep half a dozen or more thieves or burglars from breaking in and robbing the bank, and if the cashier had reason to believe that they were trustworthy, then he was not, as it seems to me, guilty of negligence in not adopting other and extra precautions. But it is strenuously contended that the watchmen were guilty of such negligence in admitting the robbers into the bank, as renders it responsible for the loss. This, it seems to me, is the very heart of the case. The act of the watchmen, under the circumstances, can hardly be characterized as negligence, in the ordinary use and meaning of the word. They were tricked and imposed on by an artifice and stratagem of the principal robber, and in admitting him and his confederates they were doing what they supposed would result in the greater security and protection of the bank. It was an act of indiscretion on their part, and an error of judgment, however well intended; and it was moreover an act of malfeasance, because it was done in direct disobedience to the orders which they had received. It was undoubtedly the cause of the robbery, the sole and only cause, without which it would not have taken place. Is the bank then responsible for their act in admitting the robbers—call it what you may, gross neglect of duty, indiscretion and error of judgment, or downright malfeasance? If it is, then the bank is liable for the loss; but, after the best reflection that I have been able to give to the matter, it seems to me that the bank is not responsible for their acts. In accepting the deposit, the bank did not contract for the honesty and fidelity of its servants. It did not undertake to be responsible for the indiscretions, blunders, or disobedience of orders on the part of the watchmen employed to guard the bank. All that it undertook in accepting the deposit was that it would keep it locked up in the vault with reasonable care, and that it would with

the same care and diligence select competent, honest and faithful officers and clerks and watchmen to manage the affairs of the bank and to guard its moneys, securities and deposits from theft or robbery. If it kept the plaintiff's box deposited in the vault, as it impliedly undertook to do, and if with reasonable and proper care it selected watchmen of approved care, fair honesty, competency and fidelity, and if, after they employed them, they had always found them trustworthy, and had no reason to distrust them, their capacity or fidelity, then it is not responsible for their act, which was the occasion of the robbery, however negligent or culpable it may have been.

It only remains to notice the points which have been presented by the counsel on both sides. Some of these have been already considered in the general charge, but they will now be specifically read and considered.

The plaintiff's *first* point is in these words:

The degree of care to be used with regard to the safe keeping of property by a bailee, varies according to the circumstances of each case, and rises in a case like the present, where the bailee has in his possession for safe keeping a large amount of valuable securities which can be easily disposed of by thieves with but little danger of detection.

That is affirmed; the general proposition is correct undoubtedly.

Second. If the jury find from the evidence that it was the custom of banks to have open glass windows and keep a light burning, so that persons on the outside could see if anything was wrong, neglect to do this, and the having tight shutters to the windows, was negligence on the part of the bank.

That point is refused.

Third. That if the jury find from the evidence that the vault of the bank was insecure and unsafe, and the officers of the bank neglected to adopt the modern improvements in the construction of vaults for the safe keeping of valuable papers, bonds, &c., which were adopted by other banks in this city, the bank is liable to the plaintiff for the value of the bonds belonging to him, and which were lost or stolen from the bank, and the verdict must be for the plaintiff.

That point is refused.

Fourth. If the plaintiff was a depositor in the bank, and the bank, on account of his keeping a deposit there, received his box for safe keeping, there was a sufficient consideration to prevent the contract being a mere gratuitous bailment.

This point as put is declined. If the bank had agreed to keep the box, in consideration that the plaintiff would deposit his money in the bank, the point would be correct.

Fifth. The receipt by the defendants of the bonds having been shown, the burden of proof of showing what became of the bonds is on the defendants.

This point as a general proposition may be true, but it has now become immaterial, inasmuch as the defendants' liability for the loss must be determined from all the facts and circumstances in evidence.

Sixth. It is no defence to the claim of the plaintiff, if the bank by her negligence lost some of her own securities and money.

This point is correct; but the fact that the bank lost some of its own

securities, may be taken into consideration in determining whether the bank was guilty of culpable negligence in not taking proper care of the plaintiff's deposit.

Seventh. If the jury find from the evidence that there was notice to the officers of the bank, on the day of and some hours before the burglary, that an attempt would be made to rob the bank, it should have put them on their guard; and if the jury find from the evidence that no extra precautions were adopted to prevent the same, defendants were guilty of negligence, and the verdict should be for the plaintiff.

This point is declined; whether the bank was guilty of negligence in not adopting extra precautions depends upon the fact whether the existing precautions were or were not reasonably sufficient to guard against the threatened danger.

Eighth. The suspension of the watchman Murphy, and his discharge from the employment of the bank, by direction of the president, may properly be considered along with the rest of the testimony in determining the question of negligence.

I decline to charge that it should have any weight.

On the part of the defendants, I am asked to charge:

First. To entitle the plaintiff to recover, he is bound to prove gross negligence on the part of the defendants, and that the bonds were lost by reason of such negligence.

Second. To entitle the plaintiff to recover, the evidence must show that there was gross negligence on the part of the bank, and the bonds were lost by reason of such negligence.

Third. The bank would not have been liable, if their servants to whom they entrusted the care of their own property, had themselves stolen the property, nor if they had colluded with the robbers; the bank is, therefore, not liable, because their servants failed in their duty by admitting the robbers while ignorant of their character.

This point is irregular, but as it is substantially embraced in the second point, it is declined because it is argumentative.

Fourth. If the bank took the same precautions as respects the plaintiff's property as they did with respect to other similar property left there, as was the plaintiff's, and as they did in respect to the property of their directors and officers, the plaintiff cannot recover.

This point is affirmed, with the qualification that the bank took reasonable and proper precautions to secure the safety of their own property.

Fifth. If the jury believe that the bank did place the plaintiff's property in the same vault as they placed similar property of their directors and officers, and secured the vault by locking, the plaintiff cannot recover.

This point is affirmed, with the qualification that the bank took reasonable and proper care of the property in other respects.

Sixth. There was no undertaking by defendants to keep safely, but only to keep as they usually kept such property.

This point is affirmed. It undoubtedly expresses the true nature of the contract.

Seventh. It was the duty of the plaintiff to inquire how and where the bank kept property left with them, as the plaintiff's was; and he must be taken to have assented to the usual custom.

This point is affirmed. The evidence shows that the plaintiff knew that the property was kept in the vault on one of the shelves.

Eighth. If the testimony of the defendants as to the place in which the box was kept, and that it was locked, and watchmen were kept there by the bank, is believed, the defendants are not liable for the loss, if the jury believe the evidence as to the mode in which it occurred.

This point is declined. It is impossible for the court to know what was in the mind of the writer of that point; how much he includes, how much of the evidence he had in his mind; and it is grasping the whole case; it may or may not have a bearing on the testimony of the other side.

Ninth. The defendants' evidence, if believed, has fully shown that there was not such negligence as must be proved to render the defendants liable in this action.

This point is declined.

Tenth. And as the plaintiff must affirmatively show negligence, there is no proof in the case which entitles the plaintiff to recover.

That also is declined.

This brings us to the *plaintiff's seventh* and the *defendants' second* point.

If the jury find, from the evidence, that the watchman whose duty it was to guard the premises at night, was guilty of negligence in letting strangers into the bank, and then going away and leaving them there, and that this negligence was the cause of the loss, the bank is liable for his default, and the verdict should be for the plaintiff.

The defendants' *second* point is:

If the bonds were placed in the vault provided by the bank, and the door was locked, the bank is not liable, because their watchmen incautiously admitted the robbers into the bank.

These points involve, it seems to me, the very pith and marrow of this case, and for the reasons given in the general charge, the plaintiff's seventh point is *refused*, and the defendants' second point is *affirmed*.

These are all the instructions which the court has to give the jury on the principles of law applicable to this case. It will be the duty of the jury to determine, in accordance with them, whether the bank had been guilty of such want of reasonable and proper care as to render it responsible for the loss of the plaintiff's securities; if that is so, the plaintiff is entitled to recover the value of the bonds with interest from the time of the plaintiff's demand and the defendants' failure to produce them. But if the bank has not failed in the exercise of a reasonable and proper care, the verdict should be for the defendants.

Then, gentlemen, you will have to determine, under the charge of the court, whether there has been any want of reasonable and proper care on the part of the bank which led to the loss of the plaintiff's securities.

On the other side, you have on record the fact that the bank gave notice to some of its depositors to take away their boxes. I think it wholly immaterial whether it gave the plaintiff notice or not; if they continued to keep his box, they were were just as liable for the loss as if he got no notice at all. You will therefore determine whether, under the charge of the court, the defendant was guilty of want of reasonable and proper care which led to his loss. It was their duty to keep this box in the vault, and keep the vault locked at night. But if, as I have said, it was necessary for the pro-

tection of the bank that a watchman should be in it, it was their duty to select competent and honest, faithful, trustworthy men, and they were responsible for any negligence in that respect. You will determine, then, whether they exercised due diligence in order to ascertain the character of the men, and whether the men had proved themselves trustworthy.

The only instance in which it was known that there was any disobedience of duty at all, until the night in question, was at the time when the president and cashier and some officers of the General Government were there examining the state of the bank. Murphy heard a voice outside which he recognized as the treasurer of an association who deposited money there, and he let him in; for this he seems to have been reprimanded by the president, and he told the president he recognized by the voice who it was. The president seems to have been satisfied that under the circumstances there was no default, for he said "all right." In determining whether that was sufficient to cause his discharge, and it were negligence on the part of the bank to keep him there after that, you will take into consideration the fact of the number of persons who were in the bank at the time, and the fact that he recognized the voice as the voice of a man who was in the habit of making deposits there.

The case is for you under the charge of the court. You will render such a verdict as you think the evidence justifies.

Hon. F. C. Brewster, for plaintiff.

Alex. D. Campbell and *R. C. McMurtrie, Esqs.*, for defendant.—*Legal Intelligencer.*

SUPREME COURT OF ALABAMA.

[JANUARY, 1873.]

WHAT CONSTITUTES A LAWFUL AND CONSTITUTIONAL LEGISLATURE IN THE STATE OF ALABAMA.

IN RE SCREWS.

PECK, C. J.—This important case has been pressed upon the court at the very heel of the term, while much other necessary business remained to be disposed of before the final adjournment.

Less than forty-eight hours remained to us after the record and briefs and arguments of the counsel came to our hands.

This time has mainly been employed in examining the case, the record, the facts settled and agreed upon by the parties, with the arguments of counsel, to enable us to reach, if possible, a correct conclusion, which I hope we have succeeded in doing; but no time remained to write out at length the opinion of the court, setting out the reasons that conducted us to the result. The result I now proceed to read as follows, to wit:

1. Every officer, who, by the constitution or laws of the State, is required to be elected by the people, derives his right to the office by his election, and the evidence of his election in the first place usually is the certificate of the proper officer; or if he is an officer, who by the constitution or laws is required to be commissioned by the governor, then his commission is the evidence. This evidence, the certificate or commission, is not conclusive, but *prima facie* evidence only, which may be overcome or destroyed by better evidence, to wit: by the judgment of a competent court, if he is an executive or judicial officer; if a legislative officer, a senator or representative of the general assembly, then such evidence is the determination of the legislative body of which he claims to be a member, to wit: the senate or house of representatives declaring him to be or not to be a member of said body. Each house of the general assembly is, by the constitution, made sole judge of the qualifications, elections and returns of its own members. (Art. IV., sec. 6, of the constitution.)

When, therefore, either house declares that a certain person is a member of its body, that is final and conclusive, and no court can go behind it.

The Senate and House of Representatives, each, since their organization under the proposal of the Attorney General of the United States, made for that purpose, has declared that certain persons, who had one certificate of election, were elected by the people, and certain other persons, who had certificates of election, were not elected by the people; and the first-named persons have been declared and recognized as members of the respective houses. This is conclusive upon us, and we have no power to review or revise what has thus been done. These persons, if elected by the qualified electors, were members of the general assembly from the day of their election, and being members, then the two bodies who convened and organized at the court-house in Montgomery had a majority in both houses; and, having such majority when recognized by the governor, were a constitutional general assembly, and were competent to do any act, as a general assembly, except such acts as can only be done by a majority of two-thirds of the members of each house. They could elect a public printer or a senator to the Congress of the United States.

I do not regard it necessary that the general assembly should convene and organize in the capitol building,—neither the constitution nor any law of the State requires this. They are required to convene in Montgomery, not in the capitol building; nor in the organization is it necessary that the lieutenant-governor or the speaker be present. These officers preside—the lieutenant-governor over the senate, and the speaker over the house of representatives—after they are organized, not necessarily before.

2. The statement of facts in this case, settled and agreed upon by the parties, shows that on the 10th day of December, 1872, after the bodies that convened and organized at the court-house in Montgomery, claiming to be the general assembly, were recognized by the governor as the general assembly of the State of Alabama, elected Arthur Bingham the public printer of the State.

We hold, that notwithstanding the peculiar circumstances attending the meeting and organization of said bodies, and their recognition by the governor, said election was not void, but valid; and that as said Bingham has given his official bond, which was approved of by the governor, and has

received a commission as public printer, &c., he is to be regarded as the public printer of the State, and entitled to all the privileges and emoluments of said office, and authorized to discharge the duties of the same; consequently, the decision of the city court, denying the mandamus prayed for by the petitioner in his petitions, is free from error, and must be affirmed at petitioner's cost.

PETERS, J.—I concur not only in the reasoning, but also in the conclusion of the opinion of the Chief Justice, which has just been read in this case.

The State printer is an officer elected by the general assembly at the time appointed by law. That time had arrived when the election of Mr. Bingham was made in this case. After the election of the State printer by the general assembly he is required to give bonds, as prescribed by the statute, and to take the constitutional oath of office. (Rev. Code, §§ 123, 127, 129; Constitution of Ala., 1867, Art. XV., st.) When this is done, he becomes one of the executive officers of the State. And although he is not one of those officers especially required to be commissioned by the governor, yet the governor alone can approve his bond. And if, as evidence of his approval and of the proper qualification of the officer so appointed to discharge the functions of his office, he is commissioned by the governor, this court cannot say that such commission has been inadvertently issued, and step in and aid the chief executive of the State in the manner of performing his duties or perform them for him. (Rev. Code, §§ 126, 148.) We must presume that the governor knows his own duties and how to perform them; and that he would not approve the bond and commission any person as State printer without the proper evidence of his appointment by the proper authority, and particularly when this is done during the session of the general assembly, and with their full knowledge, and while that body, having control for the time being of the sovereign power of the State over the very question in controversy, acquiesces in such approval and commission.

When this is the case, the courts have no other alternative than to acquiesce also. This is necessarily so, at least until the general assembly, which speaks the legislative mind of the people of the State, shall decide otherwise. Then it will become the duty of the governor and of this court to conform to this declaration of legislative will; otherwise a State printer may be made by this court against the will of the general assembly and the commission of the governor. This is not a power vested in this tribunal. An office created and filled by the general assembly is a revocable franchise given by statute. It may also be taken away or abolished by the statute, unless it is protected by a constitutional provision. (*Perkins* v. *Corbin*, 45 Alabama, 103.)

Such office is not a vested right, which is above legislative control. Then, in what way the legislature shall bestow it, or in what manner that body shall put an end to it, is a matter over which they exercise the sole, unlimited, sovereign power. (45 Ala., 103, *supra.*) If I had much greater doubt about the regularity of the organization of the legislative body that elected Arthur Bingham State printer on the 10th day of December last than I do, I would still feel a very grave reluctance to declare such election void.

The constituent elements of the same body are still acting in the capacity of the general assembly of this State, and they have not and do not repu-

diate the election thus made. It is their affair. If they are content with it, they have the power and the right to be so content. In this matter they alone speak the sovereign will, and in this they must be followed by the courts. No judgment of this court or any other, so long as they act within their constitutional limits, can reverse or interfere with their decisions.

In such a matter they are a law unto themselves. They are the sole judges of the thing to be done and the manner in which it should be done. Their action, however irregular it may be, when compared with former usages, is the law with them, and it is equally the law of this court. Until they choose to change their action, it must be final with this tribunal. Courts cannot regulate legislatures, but legislatures can regulate courts. It is the duty of the courts, so far as they can, to find out the legislative will, and to follow it in their judgments. Guided by this maxim, I can do no more than to concur with the venerable Chief Justice of this court in declaring Arthur Bingham State printer until it is the will of the general assembly to determine otherwise. The legislative body may make mistakes. They may do wrong. They may commit what the over-fastidious may pronounce serious blunders. They are but men; and humanity is never, in a legislative sense, infallible. But this court can only interfere to control their mistakes, should such mistakes occur, when they involve a disregard of some constitutional restraint or limitation of their powers in the enactment of a law. Beyond this courts cannot go. *Non nastrum est tantas componere lites.* (See *Challefaux et al.* v. *Ducharnei et al.*, Wis., 554; *Kottam et al.* v. *Ayer*, 3 Strab., 92; *Drake ex rel.* v. *Mahany*, 13 Mich., 481; *State* v. *Johnson*, 17 Ark., 407; *Marbury* v. *Madison*, 1 Cranch, 137, and *Luther* v. *Borders*, 7 How., 1 *et seq*.)

The judgment of the court below is free from error, and should be affirmed.

SAFFOLD, J., dissenting.—I concur with the Chief Justice in the following propositions:

1. That it is not indispensable to the organization and existence of the general assembly that it should meet in the capitol or be presided over in the senate by the lieutenant-governor, and in the house of representatives by the speaker, or be recognized by the governor.

2. That the members thereof derive their authority to act as such from their election by the people, and not otherwise.

But I maintain that there are cases in which there is no general assembly, notwithstanding a majority of each house may meet at a time and place appointed by law, and organize and assume to be the general assembly; and that the present is such a case.

We know now who are entitled as members thereof to compose the general assembly, because it has been ascertained by an undoubted general assembly. It appears from the finding that the prior assemblage at the capitol lacked the indispensable requisite of a general assembly, to wit: a majority of the members of each house. This was the only defect of that assemblage, either in form or substance. But it is vital and fatal to its claim to be the general assembly.

The assemblage at the United States court-room, lacking every mere form in its organization, had, as has been subsequently ascertained, a majority of the duly elected members of each house. In refusing to attend at the capi-

tol, and on organizing at another place, its members staked their defence upon the *truth* of their claim to be a majority of each house. The result of a proper investigation vindicated this claim, and prevented the other body from constituting the general assembly. Necessity is a law. But the validity of acts dependent alone upon it fails if there was not the necessity. The court-house assemblage might have been held to have been the legislature if nothing else had transpired within a reasonable time.

Appeal was made by each claimant to the President of the United States for recognition. One body was meditating the impeachment of the governor for refusing to recognize it, and both were proceeding to declare vacant the seats of members who belonged to the other. Nothing but force would have decided the dispute, if it had not been for the intervention of the President through the United States Attorney General. In obedience to his suggestion, the house of representatives readily organized and awaited the organization of the senate, which was effected some time afterwards. The most important of the contested seats have been determined in this new organization by the whole number of members undoubtedly entitled to seats, and others are awaiting its action. Notwithstanding this inquest determines that the court-house assemblage had a majority of each house, I insist it was not the general assembly.

A legislature, to be such, must, of course, have all the powers which it may exercise. Some of the powers require to be exercised by two-thirds of each house. Can a bare majority in favor of such exercise in a particular instance, expel the minority opposed, or refuse to let them meet with them? May the majority, wherever congregated in the city of Montgomery, assume on the instant to be the legislature. and pass a law? These extreme cases suggest the right both of the minority and of the people to have their voice in the passage of laws or the performance of other duties by the legislature.

The rule I deduce for determining the right of the majority to hold a session of the legislature, and the right of the minority to be present, without which the majority cannot legislate, is this: the minority must be absent either necessarily or wilfully, without fault on the part of the majority, to enable the latter to hold such session. If they are sick, or unable from any cause to come, or if they are refractory, and will not come, the majority may proceed without them. But if their absence proceeds from a reasonable belief that the body claiming their attendance has no right to do so, their objections ought to be removed through conference with them, or they should be placed in fault by such attempt, so that they may be brought in by compulsion. When a large number are absent their attendance ought to be compelled, because the people have a right to the influence they may exert, and also to have all doubts about the validity of the legislature removed.

In this instance the conference was held, and resulted in the proper organization of the assembly according to all the forms of law. No necessity exists now for regarding the court-house assemblage as the general assembly, and without such necessity it ought not to be so regarded. The undoubted general assembly has been in session more than a month, with the question of the validity of the claims of the former assemblages to be such constantly before it, and it has been unable to formally ratify or repu-

diate either, while the acts of both, with some exception, have been ignored or revised.

The convention parliament which restored Charles II. met without the summons of the king, and the first thing done after the king's return was to pass an act declaring it to be a good parliament, notwithstanding the defect of the king's writs. Blackstone says the meeting was for the necessity of the thing, which supersedes all law, for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. So, at the time of the revolution in 1688, the lords and commons, by their own authority, met in a convention, and disposed of the crown and kingdom. This assembling was upon a like principle of necessity as at the restoration; that is, upon a full conviction that King James II. had abdicated the government, and that the throne was thereby vacant, *which supposition of the individual members* was confirmed by their concurrent resolution when they actually came together. The convention was declared to be really the two houses of parliament, notwithstanding the want of writs or other defects of form, by Stat. 1 W. and M., 1 ch. 1; 1 Blackstone's Com., 151, 152.

In the *People* v. *Hatch*, 33 Ill., 9, a portion of the members of the legislature came together, and assumed to act as the legislature, after it had been adjourned by the governor under a misapprehension of a disagreement. The members had been disconcerted by the prorogation, and for twelve days had taken no action. This was considered an acquiescence in the action of the governor, and the subsequent assembling was declared by the court not to have been a meeting of the legislature. In that case every ingredient of validity seems to have existed. A meeting at a time and place appointed by law—no dispute as to membership. A session begun and not actually terminated. An admitted mistake of the governor in proroguing the body. Disconcertion of the members rather than acquiescence.

How easy will it be, when the parties into which the members may be divided are nearly equal, for a sufficient number of seats to be contested, to raise genuine doubts about who are entitled to them? The State is liable to be convulsed on the most frivolous occasions, and long afterwards private citizens may be greatly injured, without fault of theirs, by judicial determination of the validity of laws which they were unable in any way correctly to determine for themselves. Such doubt and difficulty now exist in this State; and to the beneficent interposition of the Federal authority alone are we indebted for the privilege of deciding this case before a civil tribunal, rather than having it submitted to the cruel arbitrament of intestine strife.

CIRCUIT COURT U. S.—NORTHERN DIST. OF ILLINOIS.

[MARCH, 1873.]

MUNICIPAL BONDS—THE RULE AS TO BONA FIDE HOLDERS CONSIDERED.

MARCY v. *TOWN OF OHIO.*

The bona fide *holder, for value paid, of coupons payable to bearer, issued by a town organized under the township organization law of Illinois, by virtue of a special act of the legislature, empowering such town to vote subscription to the capital stock of a railroad company, is not bound to prove that every prerequisite has been complied with in order to maintain his action.*

A mere irregularity in the form, for example, of an election, called to vote for or against such subscription, does not constitute a good defence to a suit upon the bonds or coupons in the hands of a bona fide *holder.*

The plaintiff in this case has established a prima facie *case, by showing the law, the vote, the acceptance by the company, the issuing of the bonds, and a compliance with the conditions upon which the vote was taken, though, as to this last, it was, perhaps, not necessary for the plaintiff, in a case like this, to prove such compliance.*

It is not material under the statute in question that the application for the election should be formally addressed to the town clerk. The application was, in fact, received by him, and he acted upon it by giving the requisite notices for the election.

That the ordinary judges of election, the supervisor, assessor and collector, presided and canvassed the votes, instead of a moderator, if a defect at all, is but an irregularity, which does not render the election void, nor invalidate these securities in the hands of an innocent purchaser.

Held, *that it is to be presumed that the persons authorized to vote under the terms of this act were legal voters, and not mere inhabitants.*

That the subscription in question was not made until after the Constitution of 1870 *took effect, is not such unreasonable delay as will constitute a valid defence against an innocent holder of the bonds; the new Constitution expressly permitting such subscription to be made where there has been a prior vote.*

The conditions of the vote in this case construed, and held to have been complied with.

Where bonds are placed in the hands of a third person to deliver upon the happening of certain things, and he delivers them irregularly or prematurely, or contrary to instructions, and the bonds pass into the hands of bona fide *purchasers without notice, the loss, if any, must fall upon the party who has so placed them in the hands of a third person, and not upon the purchaser.*

DRUMMOND, J.—On the 28th of February, 1867, the legislature incorporated the Illinois Grand Trunk Railway, with power to build, maintain, and use a railway from some point or points on the Mississippi River, either

at Rock Island, Fulton, or any other intermediate point or points to Prophetstown, Mendota, Newark, and the village of Lisbon, Grintown and Joliet to Chicago, or to any desirable point on the Indiana State line. The road was to be built on or near the established line of the old Illinois Grand Trunk Railway, as nearly as might be practicable, from Prophetstown to Joliet, running through the places aforesaid.

On the 25th of March, 1869, the legislature amended this act, and declared that "any city, incorporated town or township, which may be situated on or near the route of the Illinois Grand Trunk Railway, west of the city of Mendota, by the way of Prophetstown to the Mississippi River, may become subscribers to the stock of said railway, and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions, and on such conditions as they may choose, and the directors of said company may approve —the proposition for said subscription having been first submitted to the inhabitants of such city, town or township, and approved by them."

The amendment further provided that upon the application of ten voters, as aforesaid, specifying the amount to be subscribed and the conditions, it should be the duty of the clerk of the city, town or township, to call an election in the same manner that other elections for the city, town or township were called, for the purpose of determining whether the city, town or township would subscribe to the stock of the railway; and it provided that if a majority of the voters should be for the subscription, then the corporate authorities of such city, town or township, and the supervisor and town clerk of such township, should cause the subscription to be made, and upon its acceptance by the directors of the company, the bonds were to be issued in conformity with the vote, which bonds were to be of not less than one hundred dollars, and in no case to bear a higher rate of interest than ten per cent.

Under these laws bonds were issued by this town, and bore upon their face they were issued under them, and they came into the hands of the plaintiff in good faith for value. Upon the coupons of these bonds this suit has been brought, and various objections have been made by the town to the recovery by the plaintiff in this case.

I suppose there can be no doubt that in a case like this it is necessary for the plaintiff to make out that the bonds were issued in pursuance of authority properly given to the town. This is claimed to be shown by the introduction of the law, and by showing that there was an application made, as required by the law, containing certain conditions; that there was a vote taken, and that the majority of the vote was in favor of the subscription; that it was accepted by the company, and the bonds issued in pursuance thereof, the conditions having been complied with.

How far it is necessary for a *bona fide* holder of bonds or coupons issued in this way to establish in evidence, before recovery, the conditions under which the bonds were to issue, is a question about which there has been a good deal of controversy in the courts—whether, in other words, it is incumbent on the *bona fide* holder of bonds or coupons to prove all the prerequisites which the law required, prior to the issuing of the bonds.

The courts have held uniformly, in the construction of such laws, that it is not indispensable that *every* prerequisite should be shown, and they have

further uniformly held that a mere irregularity in the form, for example, of an election, did not constitute a good defence to the suit for the bonds or coupons in the hands of the *bona fide* holder.

The first objection made is in relation to the authority, and my opinion is, that upon this question a *prima facie* case is made out when the plaintiff has shown what has been already stated—the law, the vote, the issuing of the bonds, the acceptance and compliance with the conditions upon which the vote was taken; though as to this last, perhaps, it was not necessary in such a case as this.

One of the objections on the part of the town is, that there was no town election held.

The facts are, that when the application was made by the number of voters required by the statute, and notice was given, the election seems to have been held by the ordinary judges of election, and not by the moderator, who ordinarily presides at mere town meetings.

The authorities of the town, or the persons whose advice was followed in this case, seem to have thought that it being an election, the judges of election, as in State and county elections, should receive the votes; and they accordingly did receive, canvass and announce them.

The Supreme Court of this State has decided that, in the absence of all language in a statute designating the particular manner in which an act shall be done by a town, the presumption is, it is to be done by the town as a town or a township. The only organization that this town of Ohio had was the township organization under the statute. The Supreme Court having held that, under a statute such as this, it was the duty of the township to have proceeded in a regular town-meeting manner, perhaps it would have been proper that the moderator should have received and canvassed these votes, rather than the judges of election. I do not see, as to one objection that is made, that the application is addressed to any particular person. I do not think that is material. The object of the law was, that there should be an application made, and that the clerk should give the notice. The application is shown, and the clerk did give the notice, and there is no question made but that the notice was such a notice, and for such time as the law required.

There is further objection made as to the votes that were taken. It does not appear that there was any one who was desirous to vote whose vote was rejected, and the presumption would be, I think, that legal voters were meant by the language of the law.

Another objection taken under this head is, as to this being an election to subscribe stock to the Illinois Grand Trunk Railway Company, when the corporation was the Illinois Grand Trunk Railway. I do not think that is a substantial objection.

The application is in proper form, describing the corporation as the Illinois Grand Trunk Railway, and the notice seems to be so, and the bonds that were issued seem to be in the same form.

But the principal objection taken under this head is that which has been already referred to—the fact that the judges received and canvassed the votes instead of the moderator; and the question is, whether that is, as against this plaintiff, a vital objection—one going to the foundation of the

authority, so far as he is concerned, warranting the town, as to him, in saying that the bonds were unauthorized because of this defect.

My opinion is, that it has not that right; that it is simply an irregularity, and does not render the election (even conceding the correctness of the position taken by the defence) absolutely void, and the bonds in the hands of an innocent holder a nullity.

The main thing in this election was to determine whether there was a majority of the voters in favor of the subscription upon the conditions named. There is no dispute but that there was such a majority; and the fact that certain persons named as judges, by common consent, received the votes and canvassed them, is nothing more than an irregularity which might render the election voidable, but does not render it a nullity when suit is brought upon the bonds in the hands of an innocent holder.

Another objection taken on the part of the defence is, that the proposition of the town to subscribe for the stock was not accepted by the company until October, 1870, after the adoption of the new Constitution of the State.

The election was held on the twenty-first day of August, 1869, and it is contended that this was an unreasonable delay, and that the town was not bound by an acceptance of the company made after so long a time, the Constitution of 1870 having prohibited municipalities from making subscriptions to the capital stock of railroad companies or private corporations.

But the new Constitution also provided that the adoption of the section prohibiting subscriptions in the future should not be construed to affect the rights of any municipality to make a subscription where the same had been authorized under a law already in force by a vote of the people prior to the adoption of the Constitution.

The only question, therefore, would be (this being within the letter and spirit of that provision of the Constitution) whether there was an unreasonable delay, and I do not think that, as against an innocent holder, the court can assume that there was such delay as to render the bonds void in his hands.

The next objection is one about which I have had considerable difficulty, under the language of the amendment of March, 1869, declaring, in case there is a majority of the voters in favor of a subscription, that the corporate authorities of the said city, town or township, *and* the supervisor or town clerk of the said township, shall cause the subscription to be made, and upon its acceptance by the directors of the company, shall cause bonds to be issued in conformity with the vote.

The bonds, in point of fact, were in this instance issued by the supervisor of the town, and the clerk; and the question here is, whether that is within this clause of the amendment; and it may be a question who are the corporate authorities within the meaning of this law.

Of course, the words supervisor and town clerk of a township could not both apply to a city—"said city, town or township, and the supervisor and town clerk of said township"—because, as we know, ordinarily, a supervisor is not an officer of a city. There must, therefore, be some limitation of this language, the "supervisor and town clerk of such a township," and after some hesitation I have come to the conclusion that the supervisor and town clerk are, within the meaning of this law, the corporate authorities who had the right to act, to cause the subscription to be made, and the

bonds to be issued; and I think that has been generally the construction given to language similar to this, as used in statutes. I find several cases where the supervisor and town clerk have issued the bonds under somewhat similar language to that which has been used here, and either no objection was made to the authority, or else it was overruled if any was made.

This is a question, I admit, not free from difficulty; but I have thought, in view of the decisions which have been made by the Supreme Court of the United States, in relation to bonds, with such recitals in the hands of *bona fide* holders for value, that the construction ought to be, in a matter of doubt like this, in favor of the holders of the bonds.

Another objection made is, that one of the conditions was not complied with—that the road was not completed, as required by the conditions of the vote.

It seems to me that, as a matter of fact, that is hardly made out. But, on the contrary, I am inclined to think that the weight of the evidence shows that the road was completed within the fair meaning of the condition.

One of the conditions was, that "the Grand Trunk Railway shall be completed, and the cars running thereon, for the purpose of carrying passengers and freight from Mendota through the town of Ohio." It can hardly be contended, I apprehend, that the whole of the road should be completed from the Mississippi to Chicago, or the State line, before the bonds could be issued within this condition, in view of the limitation made by the amendment itself to the towns that might subscribe, they being west of the city of Mendota.

Another objection made is, that these various conditions that were annexed to the application, and the notice of the vote, were not inserted in the bonds.

The language is somewhat peculiar: "Said bonds to be issued and delivered only on this expressed condition, 'that the aforesaid Grand Trunk Railway,' &c., 'shall be completed.'"

The construction sought to be given by the defence is, that these conditions should be "expressed" *in* the bonds—that is, inserted in the bonds, and it being conceded that they were not, that the issue was unauthorized and void.

I hardly think that so rigid a construction as this ought to be given to this language. The word, to be sure, is "expressed." The language is not, however, "expressed in writing"—it is not that these conditions are to be inserted in the bonds. It would be a literal compliance with this language, if the conditions were expressed orally when they were delivered. Anything may be expressed by word of mouth, as well as by writing, and, as against an innocent holder, it seems to me that to sustain the objection would be a stringent construction of this language. The meaning of it was probably intended to be, simply, "upon the express condition," and it may be nothing but a mere clerical error, or an ungrammatical phrase.

I am inclined to think, however, that had the intention been that the condition should be inserted in the bonds, and if that had been the meaning of the signers to the application, that intention would have been stated a little differently.

There is nothing in another objection made that, by the terms of the

election, no part of the principal and interest of the bonds or coupons was to become due until after five years from the issue.

I do not think that a fair construction to be placed on the whole subject.

On the contrary, I think the fair meaning would be, that coupons were intended to be payable before the principal of the bond was payable.

The language of the amendment of March, 1869, was, that bonds were to be issued, with coupons for interest attached. The language of the application is, that bonds might be issued, with interest payable at a particular time. One-fifth of the whole number were to be due in five years, and one-fifth in every succeeding year thereafter.

Now I do not think it a reasonable construction of the law, the application, the notice, and the vote, to say that the interest of these bonds was not to be payable until after the expiration of five years. On the contrary, it is apparent to every one that bonds of that character never could have been negotiated at all, and that the whole enterprise would necessarily have been a failure. This is only referred to for the purpose of putting a construction upon acts performed, and an unreasonable construction should never be placed upon acts like these.

Another objection is, that the Grand Trunk Railway was not organized when the election of August, 1869, took place.

I do not think that that would render the election absolutely void. The company was not required to do any act until the election took place, and until they were called upon to make an acceptance of the subscription. It might possibly be a question whether it ever would be organized, unless the subscriptions were made as authorized.

The ninth and tenth objections, as to the issuing of coupons and the completion of the road, I have already considered.

As to the delivery of the bonds, the facts seem to be that the bonds were issued and placed in the hands of a third party, with instructions to deliver them under certain circumstances, and he delivered them, as he supposed, in compliance with the instructions. Now there may be a very serious question whether, when bonds are delivered in such a way as this, to a third party, and are by that third party turned over and come into the hands of an innocent holder for value, the party so placing them in the third party's hands should not, in case of any irregularity in relation to the matter, or of non-compliance with instructions, suffer the consequences of such irregularity, or non-compliance with instructions; and it seems to me that under the evidence in this case, and what is stated in the bonds, and as against this plaintiff, the defendant must, if there has been any non-compliance with regulations or instructions, suffer the consequences.

This disposes of all the objections, and I think that the plaintiff is entitled to recover the amount of the coupons sued on, with interest from the time the coupons ought to have been paid.

The principles which are here stated are, I think, fairly deducible from the numerous decisions of the Supreme Court of the United States upon the subject of municipal bonds in the hands of *bona fide* holders for value.

Geo. O. Ide, of Paddock & Ide, for plaintiff.

M. T. Peters, for defendant.

NOW READY.

A PRACTICAL TREATISE

ON THE

LAW OF MUNICIPAL BONDS

BY WILLIAM N. COLER,
COUNSELLOR AT LAW.

THE necessity for a treatise of a practical character upon the subject of Municipal Bonds has long been apparent to all classes interested in their negotiation, or in questions affecting their validity. Although the true position of the Courts is not in any sense uncertain, the disposition on the part of eminent jurists to attempt to overturn the established precedents has had a tendency to create a wide-spread distrust and to depreciate the values of probably the safest and best securities in any market. To present a work that would fully demonstrate the value and safety of such securities, by incontrovertible proofs, in the form of the most authoritative expressions of the Courts; to afford a true conception of the principles that govern their issue and validity; to collect in convenient form the leading cases upon the subject; to disclose the settled law of each State, so that it may be at once apprehended; in brief, to present a practical manual to the dealer and an exhaustive compilation to the lawyer have been the objects of the author. It is believed, that wherever capital is seeking investment, or the public demanding improvement, the work will be found of the greatest utility.

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the supply usually keeps pace with the demand, and the fluctuations in the value are so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases, the reason why the value at the time of conversion, with interest, generally reaches the justice of the case, is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production, or other causes, its price is necessarily subject to considerable fluctuation." This shows that the market price is not an invariable standard, and that the converse of the case, then before Judge Lewis, is equally true; that is to say, when the market price is unnaturally inflated by unlawful and fraudulent practices, it cannot be the true means of ascertaining what is just compensation. It is as unjust to the seller to give the purchaser more than just compensation, as it is to the purchaser to give him less. Right upon this point, we have the language of this court in the case of a refusal by a purchaser to accept. (*Andrews* v. *Hoover*, 8 Watts, 240.) It is said: "The jury is bound by a measure of damages where there is one, but not always by a particular means for its ascertainment. Now the measure in a case like the present, is the difference between the price contracted to be paid and the value of the thing when it ought to have been accepted; and though a resale is a convenient and often satisfactory means, it does not follow that it is; nor was it said in *Girard* v. *Taggert* to be the only one. On the contrary, the propriety of the direction there, that the jury were not bound by it, if they could find another more in accordance with the justice of the case, seems to have been admitted; the very thing complained of here." Judge Strong took the same view in *Trout* v. *Kennedy*, 11 Wright, 393. That was the case of a trespasser, and the jury had been told that the plaintiff was entitled to the just and full value of the property, and if at the time of the trespass the market was depressed, too much importance was not to be given to that fact. "If (says Judge Strong) at any particular time there be no market demand for an article, it is not of course on that account of no value. What a thing will bring in the market at a given time, is perhaps the measure of its value then; but it is not the only one." These cases plainly teach that value and market price are not always convertible terms; and certainly there can be no difference in justice or law, in an unnatural depression and an unnatural exaltation in the market price, neither is the true and only measure of value. These general principles in the doctrine of damages and authorities prove that an inflated speculative market price, not the result of natural causes, but of artificial means to stimulate prices by unlawful combinations for the purposes of gain, cannot be a legitimate means of estimating just compensation. It gives to the purchaser more than he ought to have, and compels the seller to pay more than he ought to give, and it is therefore not a just criterion. There is a case in our own State bearing strongly on this point. (*Blyanburg* v. *Welsh*, Baldwin's Rep., 331.) Judge Baldwin had charged the jury in these words: "If you are satisfied, from the evidence, that there was on that day a *fixed* price in the market, you must be governed by it; if the evidence is doubtful as to the price, and witnesses vary in their statements, you must adopt that which you think best accords with the proof in the case." In granting a new trial, Judge Hopkinson said: "It is the price,

the market price of the article that is to furnish the measure of damages. Now, what is the price of a thing, particularly the market price? We consider it to be the *value*, the rate at which the thing is sold. To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance." The case of suspended sales upon a rumor tending to enhance the price, put by Judge Hopkinson, bears no comparison to the case alleged here, where a combination is intentionally formed to buy up oil, hold it till the year is out, and thus force the market price up purposely to affect existing contracts, and compel the sellers to pay heavy damages for non-fulfilment of their bargains. In the same case, Judge Hopkinson further said: "We did not intend that they (the jury) should go out of the limits of the market price, nor to *take as that price* whatever the holders of the coffee might choose to ask for it; substituting a fictitious, unreal value, which nobody would give, for that at which the article might be bought or sold." "In determining (says an eminent writer on contracts) what is the market value of property at any particular time, the jury may sometimes take a wide range; for this is not always ascertainable by precise facts, but must sometimes rest on opinion; and it would seem that neither party ought to gain or lose by a mere fancy price or an inflated and accidental value, suddenly put in force by some speculative movement, and as suddenly passing away. The question of damages by a market value is peculiarly one for a jury." (Parsons on Contracts, vol. 2, page 482, ed. 1857.) In *Smith* v. *Griffith*, 3 Hill, 337–8, C. J. Nelson said: "I admit that a mere speculating price of the article, got up by the contrivance of a few interested dealers, is not the true test. The law in regulating the measure of damages, contemplates a range of the entire market, and the average of prices as thus found, running through a reasonable period of time. Neither a sudden and transient inflation, nor a depression of prices, should control the question. These are often accidental, promoted by interested and illegitimate combinations for temporary, special, and selfish objects, independent of the objects of lawful commerce; a forced and violent perversion of the laws of trade, not within the contemplation of the regular dealer, and not deserving to be regarded as a proper basis upon which to determine the value, when the fact becomes material in the administration of justice." I may close these sayings of eminent jurists with the language of Chief-Justice Gibson upon stock-jobbing contracts. (*Wilson* v. *Davis*, 5 W. & S.,

523. "To have stipulated (says he) for a right to recruit on separate account, would have given to the agreement an appearance of trick, like those of stock-jobbing contracts, to deliver a given number of shares at a certain day, in which the seller's performance has been forestalled by what is called 'cornering;' in other words, buying up all the floating shares in the market. These contracts, like other stock-jobbing transactions, in which parties deal upon honor, are seldom subjected to the test of judicial experiment, but they would necessarily be declared fraudulent."

Without adding more, I think it is conclusively shown that what is called the market price, or the quotations of the articles for a given day, is not always the only evidence of actual value, but that the true value may be drawn from other sources, when it is shown that the price for the particular day had been unnaturally inflated. It remains only to ascertain whether the defendant gave such evidence as to require the court to submit to the jury to ascertain and determine the fair market value of crude oil, per gallon, on the 31st December, 1869, as demanded by the defendant in his fifteenth point. There was evidence, from which the jury might have adduced the following facts, viz.: That in the month of October, 1869, a number of persons of large capital, and among them Kirkpatrick and Lyon, combined together to purchase crude oil, and hold it until the close of the year 1869; that these persons were the holders, as purchasers, of a large number of sellers' option contracts, similar to the one in suit; that they bought oil largely, and determined to hold it from the market until the year 1870 before selling; that oil, in consequence of this combination, ran up in price, in the face of an increased supply, until the 31st day of December, 1869, reaching the price of seventeen to eighteen cents per gallon, and then suddenly dropped as soon as the year closed. Major Frew, one of the number, says: It was our purpose to take the oil, pay for it, and keep it until January 1, 1870, otherwise we would have been heading the market on ourselves. Mr. Long says, that on the 3d of January, 1870, he sold oil to Fisher & Brothers (the plaintiffs) at thirteen cents a gallon, and could find no other purchaser at that price. Several witnesses, dealers in oil, testify that they knew of no natural cause to create such a rise in price, or to make the difference in price from December to January. It was testified, on the contrary, that the winter production of oil was greater in December, 1869, than in former years by several thousand barrels per day, a fact tending to reduce the price, when not sustained by other means. Mr. Benn says he knew no cause for the sudden fall in price on the 1st of January, 1870, except that the so-called combination ceased to buy at the last of December, 1869.

It was, therefore, a fair question for the jury to determine, whether the price which was demanded for oil on the last day of December, 1869, was not a fictitious, unnatural, inflated, and temporary price, the result of a combination to "bull the market," as it is termed, and to compel sellers to pay a false and swollen price in order to fulfil their contracts. If so, then such price was not a fair test of the value of the oil, and the jury would be at liberty to determine from the prices before and after the day, and from other sources of information, the actual market *value* of the oil on the 31st of December, 1869. Any other cause would be unjust and injurious to fair dealers, and would enable gamblers in the article to avail themselves of their own wrong, and to wrest from honest dealers the fruits

of their business. It cannot be possible that a "corner," such as took place a few weeks since in the market for the stock of a western railroad company, where shares, worth in the ordinary market about sixty dollars each, were, by the secret operations of two or three large capitalists, forced up in a few days to a price over two hundred dollers a share, can be a lawful measure of damages. Men are not to be stripped of their estates by such cruel and wrongful practices; and courts of justice cannot so wholly ignore justice as to assume such a false standard of compensation. Our views upon the effect of the affidavit of defence, on which the learned judge in a great measure ruled the question of damages, will be expressed in the case of *Kountz* v. *The Citizens' Oil Refining Co.*, in an opinion to be read immediately.

Judgment reversed, and a *venire facias de novo* awarded.

SHARSWOOD and WILLIAMS, JJ., dissented as to the measure of damages.

KOUNTZ v. *THE CITIZENS' OIL REFINING CO.*

Opinion of the Court by AGNEW, J. — In *Kountz* v. *Kirkpatrick & Lyon*, opinion just read, we have held that a temporary, unnatural and inflated market price, produced by a combination of dealers in oil, for selfish and personal gain, is not the true measure of the value of that article of trade; and that, on showing such a state of the market on the day of the performance of his bargain, the defendant could resort to the market prices prevailing just before and after the day, and to other evidence of the true market value of the article, to enable the jury to ascertain the par value of the article on that day, as the measure of the damages for his breach of contract. The refusal of the court below to receive evidence for this purpose in this case was therefore error.

It is argued that this refusal of the court was founded upon a proper interpretation of the affidavit of defence filed by the defendant, by the order of the court in this case, and under its general rule. It is to be conceded that usually the courts making rules of practice are the best judges of their interpretation and application; but the question here arises upon the true interpretation of the affidavit itself rather than upon the rule. We have said heretofore that too much nicety should not prevail in considering affidavits of defence, when a solid or substantial defence is really set forth; otherwise the rule will be converted into a snare to entrap justice. (*Leibenspeger* v. *Reading Savings' Bank*, 6 Casey, 531; *Thompson* v. *Clarke*, 6 P. F. Smith, 33.) This affidavit sets forth in unambiguous terms an illegal combination of the plaintiffs and others to buy up oil, create a scarcity and enhance the price, for the very purpose of preventing the defendant from complying with his contract, and to enable them to make great gains. It sets forth also the means whereby this purpose was accomplished, and that the confederates succeeded in raising the price of oil between the dates named in the affidavit from 13½ cents up to 18 cents per gallon. It also states that on the 31st of December, 1869, the day when the contract was to be performed, the fair market price of oil was considerably less than 18 cents per gallon. Now, clearly, this would have

been a good defence to the inflated, fictitious and temporary price as a proper measure of damages. But the court below thought that the statement, that the confederates succeeded in raising the price on the 31st December, 1869, to eighteen cents a gallon, was an admission of that being the market price. It was an admission of an inflated market price, but not that it was the fair market value of the oil. What the defendant averred substantially was, that the market price on that day was the result of an unlawful combination to put up the price, but that the fair market value of the oil was considerably less than eighteen cents per gallon, which was the price sworn to in the plaintiff's affidavit of claim. What more could the defendant say truthfully? He could not conscientiously deny that the apparent price in the market on that day was eighteen cents; but he could conscientiously say that that price was not the fair and true market value of the oil on that day, and that the fictitious and inflated price was not the true measure of the damages. This he did say substantially, and he should have been permitted to prove the truth of his averments. The affidavit of defence had performed its office; he was now on the trial of its truth, and he clearly had not admitted that eighteen cents was the fair market value of oil on that day.

Judgment reversed, and a *venire facias de novo* awarded.

WILLIAMS, J. — I dissent.

SHARSWOOD, J. — I concur on the authority of *Kountz* v. *Kirkpatrick & Lyon.*

CIRCUIT COURT U. S. — NORTHERN DISTRICT OF ILLINOIS.

[MARCH, 1873.]

REMOVAL OF CAUSES — CONSTRUCTION OF ACT OF APRIL 20, 1871.

GAUGHAN v. *N. W. FERTILIZING CO.*

The act of April 20, 1871, does not authorize the removal of a case from the State courts in every case in which the United States courts would have original jurisdiction.

Congress did not intend, by the general words used, to extend jurisdiction to remove, except under the circumstances specified in the act.

DRUMMOND, C. J. — In 1867, the legislature of Illinois granted to parties the right to manufacture a fertilizer out of the offal of animals slaughtered in the city of Chicago. The act created a corporation, and authorized the location of the place of manufacture. Under this act of incorporation, the parties went on and constructed works, and commenced the manufacture of the fertilizer. The place at the time was not within the limits of the town of Hyde Park; afterwards it was included within its corporate limits, and an action was commenced in the State court by a party who felt himself aggrieved by the erection and carrying on of these works, on the ground that they were a nuisance and an injury to his property. Before that, an action was brought in this court against the town of Hyde Park, the allegation being that the town, by ordinances, had interfered with the chartered rights of the company under this act of the legislature.

There were two questions presented in the argument. One was whether this court had the right to maintain the bill filed here by the corporation called the Northwestern Fertilizing Company. The views of the court were presented upon that question the other day, and I was inclined to hold that, under the first section of the act of the 20th of April, 1871, the court had original jurisdiction of the case, on the ground that there was a right claimed by the corporation and secured to it under the Constitution of the United States, and there was an attempt on the part of the town of Hyde Park to interfere with a right thus claimed and protected. The other question, whether the company had the right to transfer the case pending in the State court to this court under the *certiorari* that was issued, was argued yesterday, and that question I will proceed to answer at this time. After the best consideration I have been able to give the subject, I am not satisfied that the court has jurisdiction in that case. I am not clear about it, and I think in all such cases the court ought not to take jurisdiction, unless it appears clear. The ground upon which it is claimed that the case can be transferred from the State to the Federal court is certainly a plausible one. It is this: That the first section of the act of April 20, 1871, declares "that such proceedings were to be prosecuted in the several District or Circuit Courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such court;" and the provisions of the act of the 9th of April, 1866, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means for their vindication, and the other remedial laws of the United States, which are in their nature applicable in such cases." Now, the position on the part of the counsel, who claim that the court has jurisdiction to remove this case by *certiorari*, is, as I understand it (and it comes to that), that, wherever the court has original jurisdiction, it can transfer a case from the State to the Federal court under this language: "Other remedies provided in like cases in such courts, and the other remedial laws of the United States which are in their nature applicable in such cases." If that is the true construction of this statute, then, of course, the court would have jurisdiction to issue a *certiorari* and to take cognizance of the case. But I am not satisfied that that is the true construction; and it seems to me it would be going further than any court has yet gone, to construe such general language as this is so as to include within its scope every case where a question would arise under the Constitution of the United States. As was stated the other day, numerous questions have arisen affecting rights under the Constitution of the United States, where parties, seeking their remedy, have been obliged to seek it through the forum of the State courts, and so on up to the Supreme Court of the United States, under the twenty-fifth section of the act of 1789, and other legislation since. It is necessary, of course, to consider what these previous statutes are,—"other remedies provided in like cases." It refers particularly to the act of 1866. That act refers to the act of 1863. It is under the acts of 1833, 1863, 1866, and 1871, as I understand, that the claim is set up, that a fair construction of this act of the 20th of April, 1871, is to conclude within its scope all the cases, so as to authorize a transfer where it gives original jurisdiction to the District or the Circuit Court. While the argument is not without force, I cannot yield my conviction entirely to it. I will state very briefly some reasons why I cannot do so.

If we look to the legislation of Congress in relation to the cases which might be removed from the State to the Federal courts, we see that, in all cases where a removal has been authorized, the circumstances under which it is to take place are specifically set forth. It is so under the act of 1833, the language of the second section of which is: "The jurisdiction of the Circuit Courts of the United States shall extend to all cases in law and equity arising under the revenue laws of the United States, for which other provisions are not already made by law." Sweeping in its terms, "All cases." But the third section declares under what particular circumstances a case was to be removed from the State to the Federal court: "In any case where suit or prosecution shall be commenced in a court of any State against any officer, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof, for or on account of any right, authority, or title set up or claimed by such officer, it shall be lawful for the," &c. — setting up in precise language under what circumstances the case was to be removed. And the third section is substantially copied into the sixteenth section of the act of 1871, which was referred to — *mutatis mutandis* — simply changing the words in some particular instances. The language of the sixteenth section of the act of February 28, 1871, is: "In any case where suit or prosecution, civil or criminal, shall be commenced in a court of any State against any officer of the United States, or other person, for or on account of any act done under the provisions of this act, or under color thereof, for or on account of any right, authority or title set up or claimed by such officer or other person under any of said provisions, it shall be lawful to transfer," — setting up just as the act of 1833 set up, specifically, the circumstances under which the transfer could be made. The fifth section of the act of 1862 is also specific: "If any suit or prosecution, civil or criminal, has been or shall be commenced in any State court against any officer, civil or military, or against any arrest or imprisonment made, or other trespass or wrongs done or committed, or any act omitted to be done at any time during the present rebellion by virtue of, or under color or authority, or direction from and exercised by or under the President of the United States, or of any act of Congress, he shall, at the time of entering his appearance in such court," and so on, "have the right to transfer the case,"—showing particularity in describing the circumstances under which it can be transferred. The first section of the act of 1866 declares that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the parties shall have been duly convicted, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue and be sued, to give evidence," &c. This first section declares that if certain circumstances occur where rights are affected by a proceeding in a State court, that then the party shall have the right to transfer the case to the Federal court. The language of the third section is quite peculiar: "That the District Courts of the United States, within their respective districts, shall have, exclusive of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act; and if any suit or prosecution, civil or criminal, has been or shall be com-

menced in any State court against any such person for any cause whatsoever." Here is language more general than in any other statute, either before or after, "against any such person for any cause whatsoever." Now it could not be maintained that by this act of Congress every person whose rights were affected could transfer a case from the State to the Federal court, because the language of the first section includes "all persons born in the United States." It could not have been the intention of this section to give the Federal courts jurisdiction of rights affecting any and all persons who were born in the United States. Certainly; but it means, I apprehend, the persons referred to in the previous part of the section — affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any rights secured to them by the first section of this act. "If any such suit or prosecution, civil or criminal, has been, or shall be, commenced against any such person, for any cause whatsoever," — it must mean the persons who cannot have their rights enforced in the judicial tribunals of the State; and the section proceeds in the usual way in which all these laws do. "Or against any officer, civil or military, or any person for any arrest, or imprisonment, or trespass, or wrongs done," &c., "he shall have the right to remove the case." Now, this being the language of the various statutes upon the subject, thus precise, thus setting out in a particular manner every contingency, which must concur in order to authorize the transfer of a case from the State to the Federal court, is it to be supposed that Congress intended, in this act of the 20th of April, 1871, by such general language as this (varying therein, it would be the rule which had always been adopted in previous legislation) to authorize the transfer? All these statutes give generally the rights, just as this law gives, and declares that the courts of the United States shall have jurisdiction; but they do not, on that account, declare that, in all such cases, they may be removed from the State to the Federal court. They specify the circumstances which must exist in order to authorize the removal, and it seems to me the argument is very strong — so strong that I do not feel inclined to take jurisdiction of the case, as where they have been specific in every other case they did not intend by this general language to authorize the Federal courts to remove a case from the State court. What is it that is claimed? It is not pretended that the right set up here is within the language of any one of the statutes authorizing the transfer. As I have said, you must take the ground that, in every case where this statute gives original jurisdiction, it was the intention that the case might be transferred. This is a right set up under the authority of the State — a charter created by the State. True, when the charter is made and the corporation is clothed with certain rights, then the Constitution of the United States throws its protecting arm around those rights, and declares that they shall not be jeopardized within certain limits — they shall not be affected by subsequent legislation of the States: that this charter, for certain purposes, is in the nature of a contract, that the Constitution protect it as a contract, and that it cannot be impaired by subsequent legislation. That is the right which is set up; and it is claimed that if this right be set up, where a party is sued in the State court, the case can be transferred. I have thought, and for the purposes of the motion so held, that the language of the first section of the act of April 20, 1871, was express in giving the court original jurisdiction,

and that the only question was whether the fact that it was a corporation deprived it of the power to come into the Federal court. I held that it did not; that if it was the case of an individual whose rights were affected it could come into the Federal court, and that it did not lose that right because it was a corporation. But I am asked to go further and hold that, in all these cases, wherever there is original jurisdiction, the case can be transferred, — that upon a particular showing it must be transferred, because the language of the various acts of Congress is whenever the contingencies have occurred provided therein, it shall be the duty of the State court to proceed no further in the cause; and it has been held that all acts subsequently done by the State court are simply void, and that the parties may disregard and pay no attention to anything done by the State court. This is the view I take of the question. I admit it is one of great magnitude. The other question is not free from difficulty, but I have felt inclined to sustain the jurisdiction in that case. The inclination of my mind is against it in this case, and I am willing to make an order remanding the case to the State court, and give the parties, if they so desire, an opportunity of testing the question before the Supreme Court of the United States, which they will have the right to do at once.

CIRCUIT COURT U. S. — DISTRICT OF MASSACHUSETTS.

COPYRIGHT IN PICTURES — ASSIGNMENT OF.

PARTON v. *PRANG.*

The sale of a picture carries with it the right to reproduce the same and to enjoy a copyright therein. And the transfer need not be in writing.

1. Parton alleges that he is an artist, earning his living by designing, composing, and painting landscapes and other pictures, and selling the same; that he designed from nature and executed the picture of rural scenery described in the bill of complaint; that having so designed and composed the same, he executed a large copy thereof in oils and sold the same; that he did not give or sell to the purchaser the right to copy, print, engrave, lithograph, chromo, or reproduce the picture in any way, or to publish the same in any form; that the respondent is a lithographer and publisher of chromos, so called; that he has made or caused to be made a chromo of the picture, and marked or engraved on the face of the chromo the words and figures, "Arthur Parton, 1869, chromo-lithographed and published by L. Prang & Co. Entered, according to act of Congress, in the office of the Librarian of Congress;" that he is informed and believes that the respondent has caused an entry of copyright to be made of said chromo under the title "Close of Day," and that he now claims the sole right to copy, print, and publish said picture and chromo thereof, under said pretended entry of copyright; wherefore he prays for an account and an injunction. Service was made, and the respondent appeared and filed answer.

Respondent admits that the complainant is an artist, that he executed the picture of rural scenery and made a copy thereof in oils as alleged;

that the complainant sold the picture to the person named in the bill, but he expressly denies that he sold it to that person for his private collection.

He also admits that he, the respondent, is a lithographer and publisher of chromos, and that he made or caused to be made a chromo of said picture, and marked or engraved upon the face of the chromo the words and figures alleged in the bill, and that he caused an entry of copyright to be made of the chromo, and that he claims the sole right to copy, print, and publish the said chromo; that to the time of the sale mentioned in the bill the complainant retained possession of the picture; that the picture to that time had been on public exhibition, and exposed to the public for sale in his studio in the city of New York; that the said purchaser there saw and examined the picture, and that the complainant there absolutely and unconditionally sold the same to the purchaser for a valuable consideration in money without any restriction or reservation of any kind whatsoever, and that the said picture in pursuance of the said sale was delivered and transferred by the complainant to the purchaser unconditionally and without any reservation; that the purchaser bought the picture for the purpose of reselling the same; that he immediately sent the picture to a firm in this city engaged in the business of buying and selling pictures and engravings for themselves and others; that the picture was there publicly exposed for sale in their store; that the respondent saw the picture in their store, and that they, acting in behalf of the purchaser and owner of the same, sold it to the respondent for a valuable consideration in money; that the sale to the respondent was made absolutely and unconditionally and without any restriction or reservation of any kind whatsoever, and that the picture was then and there delivered and transferred to the respondent unconditionally and without any reservation.

2. That the respondent called upon the complainant and informed him that he had purchased the picture, and that he intended to publish it as a chromo; that the complainant made no objection to the proposed publication, but advised the respondent as to the best manner of making the chromo, suggesting that if he changed the tint of the background, as the respondent had told the complainant he proposed to do, he would injure the chromo, and advised him to copy the picture exactly as it was at the time of purchase.

3. That the said chromos were made and prepared for the market at great expense of time, trouble, and money, as the complainant well knew; and that the complainant, during all the time the respondent was engaged in preparing and making the same, made no objection to his acts, and never claimed that he had any right to prevent the publication.

Instead of filing the general replication denying the allegation of the answer, the complainant elected to set down the cause for hearing upon bill and answer, which, like a demurrer to the bill, admits that everything well pleaded in the answer is fully proved. (2 Danl. Chan. Prac., (3d ed.,) 998; *Gettings* v. *Burch*, 9 Cran., 372; *Leeds* v. *Marine Insurance Company*, 2 Wheat., 380; *Brinckerhoff* v. *Brown*, 7 Johns. Ch., 217; *Dale* v. *McEvers*, 2 Cow., 118.) Viewed in the light of that well-settled rule of practice, it must be assumed as fully proved that the complainant sold the picture for a valuable consideration to the vendor of the respondent, and that the same

was delivered by the complainant to the purchaser unconditionally and without any reservation, and that the purchaser from the complainant in like manner sold the picture for a valuable consideration to the respondent, and that he delivered the same to the respondent unconditionally and without any reservation.

It is here discussed at length, whether the copyright act requires that the transfer shall be in writing, and the conclusion is arrived at that it need not be, a picture not being a "manuscript" within the meaning of the act.

Suppose it is not necessary that the consent of the author or proprietor of a picture should be in writing to render the sale valid, still it is contended by the complainant that neither the sale in this case to the vendor of the respondent nor the purchase of the same by the respondent from the vendee of the complainant, even though the sale and delivery of the picture in each case was absolutely unconditional, or both combined, had the effect to transfer to the respondent the right to reproduce or chromo the picture; that in selling and delivering the picture and subsequently suffering his vendee to sell and deliver the same to the respondent, he only parted with the result of his labor as property; that he did not part with the right to reproduce or chromo-lithograph the picture; that the right to multiply copies of the picture was vested in him as the author and proprietor of the same, and that he still retains that right, notwithstanding the sale and delivery by himself and the subsequent purchase by the respondent.

Undoubtedly, the author of a book, or of an unpublished manuscript, or of any work of art, has at common law and independently of any statute a property in his work until he publishes it or it is published by his consent or allowance, and that property unquestionably exists in pictures as well as in any other work of art. He has the undisputed right to his manuscript; he may withhold or he may communicate it, and, communicating, he may limit the number of persons to whom it shall be imparted, and impose such restrictions as he pleases upon the use of it. He may annex conditions and proceed to enforce them, and for their breach he may claim compensation. (*Jefferys* v. *Boosey*, 4 H. L. Cas., 815, 961; *Millar* v. *Taylor*, 4 Burr., 2396; *Queensberry* v. *Shebbeare*, 2 Eden, 329.) Numerous other decided cases also affirm the same proposition, that the author of an unpublished manuscript has the exclusive right of property therein, and that he may determine for himself whether the manuscript shall be made public at all; that he may in all cases forbid its publication by another before it has been published by him or by his consent or allowance; that a painter also has at common law the same right before publication to prevent any person from copying it, and the purchaser and owner of the picture holding the title from the painter or his assigns has the same right before publication to prevent another from multiplying copies of it or reproducing the picture; but the authorities all agree that after publication that right is lost. (*Turner* v. *Robinson*, 10 Ir. Ch., 121; same case on appeal, 10 Ib., 510; *Fisher* v. *Fold*, 1 Jones Exch., 12; *Wheaton* v. *Peters*, 8 Pet., 591; *Keene* v. *Wheatley*, 9 Am. L. Reg., 33; *Bartlett* v. *Crittenden*, 5 McLean, 37.)

An author, said Hoar, J., in *Keene* v. *Kimball*, 16 Gray, 549, has at common law a property in his unpublished works, which he may assign, and in the enjoyment of which equity will protect his assignee as well as himself. This property continues until by publication a right to its

use has been conferred upon or dedicated to the public. Independently of legislation the sole proprietorship of a manuscript is in the author and his assignees until he publishes it, but an unqualified publication, such as is made by printing and offering copies for sale, dedicates the contents to the public unless the sole right and liberty of printing, reprinting, publishing, and vending the same is secured to the author or proprietor by copyright. But there may be a limited publication by communication of the contents by reading, representation, or restricted private circulation, which will not abridge the right of the author any farther than necessarily results from the nature and extent of such limited use as he has made or allowed others to make of the manuscript or painting; or, as Lord Brougham said in *Jefferys* v. *Boosey*, 4 H. L. Cas., 961, he may withhold or he may communicate it, and, communicating, he may prescribe limitations and impose such restrictions as he pleases as to the extent of its use, which fully justifies the conclusion in *Keene* v. *Kimball*, that when a literary proprietor has made a publication in any mode not restricted by any condition, other persons acquire unlimited rights of republishing in any mode in which his publication may enable them to exercise such a right. (*Keene* v. *Kimball*, 16 Gray, 550.)

Assignments of a manuscript are required to be in writing by the copyright act, but enough has been remarked to show that a picture under that act might be transferred by an oral contract, and it is well settled law that even copyright is an incident to the ownership of a manuscript, and that it passes at common law with the transfer of a work of art. (*Turner* v. *Robinson*, 10 Ir. Ch., 142; *Power* v. *Walker*, 3 M. & S., 7.) Hence the remark of the court in *Turner* v. *Robinson*, that it was a strange proposition that the transfer of property should destroy and extinguish that which principally constitutes the value of the thing transferred, meaning not that the right to publish did not pass by the sale, but that the exclusive right of publication which attached to the manuscript was not lost by the transfer. Such a transfer of the manuscript or picture is not a publication of the same unless it was so intended by the parties; but if the sale was an absolute and unconditional one, and the article was absolutely and unconditionally delivered to the purchaser, the whole property in the manuscript or picture passes to the purchaser, including the right of publication, unless the same is protected by copyright, in which case the rule is different. (*Baker* v. *Taylor*, 2 Blatch., 82; *Ryan* v. *Goodwin*, 3 Sum., 514; *Wood* v. *Zimmer*, Holt, N. P., 58; *Pennock* v. *Dialogue*, 2 Pet., 14.) Personal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of any other description. (*Palmer* v. *De Witt*, 2 Sickels, 532; same case, 7 Robt. N. Y., 530.)

Owners of personal property have the right to sell and transfer the same as inseparable incidents of the property, and the author or proprietor of a manuscript or picture possesses that right as fully and to the same extent as the owner of any other personal property, the same being incident to the ownership. Sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions, and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property. Proper attention to these considerations will furnish the true explanation of many, if not all, of the cases referred to by the complainant, which are supposed to sup-

port the second proposition for which he contends. (*Prince Albert* v. *Strange*, 1 Hall & Twells, 1; *Queensberry* v. *Shebbeare*, 2 Eden, 329; *Bishop of Hereford* v. *Griffin*, 16 Sim., 196; *Stephens* v. *Cady*, 14 How., 528; *Stevens* v. *Gladding*, 17 How., 447; *Abernethy* v. *Hutchinson*, 1 Hall & Twells, 28.)

Beyond doubt, the right of first publication is vested in the author, but he may sell and assign the entire property to another, and if he does so, his assignee takes the entire property; and it is a great mistake to suppose that any act of Congress, at the date of the sales of the picture in this case, required that such an assignment should be in writing, and the pleadings show that the sale and delivery in each case were absolute and unconditional, and without any qualification, limitation, or restriction, showing that the entire property was transferred from the complainant and became vested in the respondent. (*Sims* v. *Marryatt*, 17 Q. B., 281; *Adderley* v. *Dixon*, 1 Sim. & S., 607.)

Confirmation of that view, if any be needed beyond what appears in the express allegations of the answer to that effect, is also found in the further allegation that the respondent called upon the complainant immediately after the sale and delivery to him and informed the complainant that he intended to publish the picture as a chromo, and that the complainant made no objection to the proposed publication, showing that the complainant as well as the respondent understood that the entire property of the picture was vested in the respondent. It is insisted by the respondent that the acts and declarations of the complainant on that occasion, as more fully set forth in the answer, estop the complainant from making any such claim as that set up in the bill; but it is unnecessary to decide that question, as the court is of the opinion that those acts and declarations amount to a practical affirmance of the contract of sale and delivery of the entire property of the picture as understood and claimed by the respondent. (*Freeman et al.* v. *Cooke*, 6 D. & L., 187; *Boucicault* v. *Fox*, 5 Blatch., 100; Bigelow on Estoppel, 475.)

Neither a conditional sale nor any unfairness is shown, and as neither exist in the case, it must be held that the complainant parted with the entire property in the picture. (*Pope* v. *Curl*, 2 Atk., 342; *Thompson* v. *Stanhope*, Amb., 737; *Mayall* v. *Higbey*, 1 Hurlst. & C., 147; *Jones* v. *Thorne*, 1 N. Y. Obs., 408; *Daglish* v. *Jarvie*, 2 McN. & G., 231; *Martin* v. *Wright*, 6 Sim., 297; *Reade* v. *Conquest*, 9 C. B., N. S., 755.) Unfairness is not pretended in this case, and inasmuch as the sale and delivery were in their terms absolute and unconditional, and without any reservation, restriction, or qualification of any kind, the court is of the opinion that complainant is not entitled to relief.—CLIFFORD, J.

COURT OF APPEALS OF KENTUCKY.

[9 BUSH.]

DECRETAL SALE—RULE AS TO ADVANCE ON FORMER BID.

STUMP v. *MARTIN.*

On the petition of the appellees, owners of the Louisville Hotel and other property in Louisville, alleging that it is indivisible, and that a sale

would advance the interests of all parties interested, the Chancery Court adjudged a sale thereof. Under this decree, the Marshal of the court made the sale, and Stump, being the highest and best bidder, became the purchaser of the hotel property at $190,100, and Murrell, the purchaser of a house and lot at $29,000. A few days after the sale an advance of ten per cent. on Stump's bid was offered by the attorney for the appellees, and a bond tendered by him signed by four of them as his sureties, conditioned that he would comply with his offer, and a motion was then made to open the bidding, which Stump resisted. The sale on this offer was set aside.

Held by the Court of Appeals:

It is a fixed and recognized rule in reference to decretal sales in this State, that a party purchasing at such a sale becomes only an accepted bidder, and the completion of this purchase depends upon the judicial discretion of the Chancellor when called upon to confirm. The bidder, it is true, has the right to infer that if he is the highest and best bidder, and complies with the terms of sale, that the property purchased is his, but still he is required to know that the Chancellor can exercise this judicial power over his offer and may approve or reject it, and to deny him this right would be to leave the rights of litigants unprotected in all such sales.

The practice in the English Courts of Chancery is to open the biddings and order a release whenever an advance of ten per cent. is offered, with an indemnity to the purchaser by paying him his costs incurred by reason of his biddings. In this State this rule has never been adopted, and has certainly never been sanctioned by this court, but, on the contrary, such sales are not disturbed by mere inadequacy of price alone, unless there has been such a sacrifice of property as to import fraud. There must be either fraud or misconduct in some one connected with the sale, some surprise or misapprehension on the part of those interested or of the officer who makes the sale, or some irregularity in the proceedings or other circumstances attending it conducing to show unfairness, before the Chancellor will refuse to confirm this act of his commissioner. It is the duty of the Chancellor to look to the rights of parties litigant, where property is placed under the control and custody of his commissioner by the judgment, and where there has been fraud, surprise, accident, &c., to disregard the act of his agent by ordering a resale; but where there is an entire absence of all unfair dealing, and the sale conducted in pursuance to the judgment, good faith requires that the rights of the purchaser should be protected, as well as the parties to the original proceedings.

It would be trifling with the stability of judicial sales, as well as the right of purchasers, to permit those who were present at the sale, or who ought to have been present, to interfere after the sale is made, and open the biddings for no other reason than that since the sale an advaneed price has been offered for the property, and hence this court has always been unwilling to go so far in any case as to say that the Chancellor has the power to set aside a sale made by his commissioner, merely because he could get a better bargain. In *Foreman, &c.*, v. *Hunt*, 3 Dana, 621; *Pusey* v. *Hardin*, 2 B. Mon., 411; *Dale* v. *Sling*, 5 B. Mon., and *Edgard* v. *Cheany*, 1 Bush, though the inadequacy of price constituted the principal objeetion to confirming the sale, this court was careful to look to other facts, in order to relieve the debtors by setting aside the sale, and mere inadequacy of price was held insufficient for that purpose. This has been the rule in

New York. (*Lefore* v. *Laraway*, 22 Barb.; *Tripp* v. *Cook*, 21 Wend.; *Williamson* v. *Dale*, 3 John's Chan. R., 290.) The practice of many of the courts of the State of following the English rule, has never been sanctioned by this court, and the rule well established and always recognized will not now be varied. In the cases referred to the property sold was that of a debtor to pay his debts, where the courts are inclined to aid him in obtaining the highest price for his property, but here the owners were not forced to sell voluntarily, and sought the authority of the court to make the sale. That the debtor may derive a benefit merely from the opening of a sale has never been held a sufficient reason for that purpose, even where the rights of infants and married women were involved, and though courts of equity will exercise jurisdiction in such cases to relieve those laboring under disabilities when the same relief would be denied adults, still, where there is no reservation in the judgment, and the price paid or offered is a fair price for the property, the Chancellor will not and ought not to disturb the sale.—PRYOR, J.

DISTRICT COURT U. S.—NORTHERN DISTRICT OF ILLINOIS.

[FEBRUARY, 1873.]

BANKRUPTCY—INSURANCE COMPANY—ASSIGNEE—LIMITATIONS.

IN RE FIREMEN'S INSURANCE CO.

The terms and conditions of an insurance policy remain binding upon the insured after adjudication of bankruptcy to the same extent as before.

Though an insurance company may while solvent waive the performance of conditions, the assignee has no such power.

Even where proofs have been furnished and losses adjusted before adjudication, it is the right and duty of the assignee to examine and revise such proofs and adjustment, and to call for further proof if the claim is not clearly made out, or there is any evidence of lack of entire good faith.

A clause in a policy limiting the right of action to one year from the loss is valid as a limitation, but proof of the debt in bankruptcy is equivalent to the commencement of a suit. Failure or neglect to make such proof or bring suit, however, within the time limited, bars the claim as effectually as failure to sue if the company were solvent.

If the loss has been adjusted before the filing of the petition in bankruptcy, such adjustment is a settlement and a waiver of the limitation clause.

After such adjudication in good faith, the claim can be proven without regard to the limitation clause in the policy.

If, however, the proof was not submitted until after petition filed, the assignee cannot make an adjustment or agreement upon which an action can be maintained.

A company while solvent may waive the proofs required by the policy, and where there is clear evidence of such waiver shown in the proof of debt in bankruptcy the debt should be allowed, subject to the right of the assignee to make inquiry into all the facts touching such alleged waiver.

If the assured shows such waiver regularly made in good faith by the company while it had the right so to do, the assignee should allow the claim, otherwise not.

The proper practice, where the assignee wishes to contest any claim of the above classes, is to ask that the claim be expunged under the 34th rule in bankruptcy.

BLODGETT, J.—Several questions of importance in the settlement of the

affairs of this company, as well as other bankrupt insurance companies now in this court, have been certified up from the Register for the opinion and direction of the court. The policies issued by the Firemen's Insurance Company contain the following clauses:

Ninth. — Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property — giving copies of the written portion of all policies thereon; also the actual cash value of the property and their interests therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the same time of the loss; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss; knows the character and circumstances of the assured, and verily believes that the assured has without fraud sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the company, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices, the invoices of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination, to any person or persons named by the company.

Twelfth. — It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within twelve months next after the loss shall occur, and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claims, any statute of limitation to the contrary notwithstanding.

These clauses, with some slight modifications of phraseology, have been inserted for many years past in nearly all policies issued by fire insurance companies, and their binding effect as essential parts of the contract has been frequently sustained by the courts.

The ninth clause imposes a condition precedent to be performed by the assured before any right of action accrues under the policy. It is true, the company may waive the performance of this condition, and many cases are found in the books where the courts have decided what acts amounted to a waiver in those cases, but the principle is well established that, unless waived by the company, the notice and proofs of loss must be furnished by the assured, as a prerequisite to his right of action on the policy. (*Mason* v. *Harvey*, 8 Welsby, Hurlstone & Gordon, 819; *Welam* v. *People's Equitable Ins. Co.*, 2 Gray, 480; *Spring Garden M. Ins. Co.*, 9 Maryland, 1; 7 Jones Law N. C., 373; *Smith* v. *Havrill*, M. F. Ins. Co.,

1 Allen, 297; 38 Penn. State, 130; 2 Greenleaf, Evidence, 406, and notes.) The questions now submitted to the court are as follows:

1. Ought the assignee to allow and pay a claim for a loss arising under a policy where no proof of loss, as required by the ninth clause, has been submitted to the company or assignee, nor any proof of debt made in the proceedings in bankruptcy, nor suit commenced, within twelve months after the loss occurred?

2. Ought the assignee to allow and pay a claim for a loss arising under a policy where the assured has furnished either to the company before adjudication, or to the assignee afterwards, the proofs of loss required by the ninth clause of the policy, but has not proved his claim in bankruptcy or commenced suit within twelve months?

3. Ought the assignee to pay such claim where no proofs of loss have been furnished either to the company or assignee, but the assured has proved a claim in bankruptcy in the ordinary form prescribed by the rules within twelve months after the loss occurred?

There can be no doubt that the terms and conditions of the policy remain binding upon the assured to the same extent whether the company is adjudicated bankrupt or remains solvent; in other words, the policy holder must recover, if at all, by the terms of his contract.

The ninth clause was undoubtedly adopted by the insurance companies for the purpose of compelling the assured to furnish the company with all the facts and details in regard to the nature and extent of the loss sustained, and a full disclosure of all the circumstances affecting the right to indemnity; and the assignee in bankruptcy, who must be supposed to be an entire stranger to the transaction up to the time of his appointment, must certainly need the information called for by this clause much more than the company, who, through its agents and officers, placed the risk. They may be presumed to know something about the nature of the risk and probable loss under it, but no such knowledge can be presumed against the assignee. It is the duty of the assured to furnish such proof as the terms of his policy require, and bring himself within the terms of his contract. As I said before, the company, by its officers, can waive this proof, but I am very clear that an assignee can make no such waiver. His duty requires him to allow and pay no claim for losses unless the assured first furnishes all the proofs and submits on request to the examination provided for. As an officer of the court, he can allow no claim or debt upon his own information or knowledge, and can waive the performance of no condition which the assured is bound to perform in order to vitalize his demand. Even where proofs have been furnished, and losses adjusted before adjudication, especially if such adjustment was made after the intervention of actual insolvency, as is the case in most of the companies before this court, it would undoubtedly be the right and duty of the assignee to examine and revise such proofs and adjustments, and call for further proof if the claim was not clearly made out, or there was any evidence of the lack of entire good faith in the adjustment.

The twelfth clause, commonly spoken of as the "year clause," has been held valid by the courts as a limitation of the right of action by contract so frequently as hardly to require authorities. (*Fullam* v. *N. Y. Union Ins. Co.*, 7 Gray, 61; *Brown* v. *Roger Williams Ins. Co.*, 5 Rhode Island, 394; *Brown* v. *Hartford Fire Ins. Co.*, Ib.; 24 Georgia, 97; *N. W Insurance Co.*

v. *Phœnix Oil and Candle Factory*, 31 Penn. Stat., 448.) As no suit can be maintained against the bankrupt after adjudication, except such as may be prosecuted by leave of the bankrupt court for the purpose of determining the amount due on a claim for unliquidated damages, proof of debt under the rules in bankruptcy must be deemed equivalent to the commencement of a suit within the spirit and meaning of the twelfth clause, and if the company is in bankruptcy, a failure or neglect to make such proof, or bring a suit, within twelve months from the time loss accrued, bars the claim as effectually as would be failure to sue if the company were not in bankruptcy.

I do not intend now to determine the effect of bringing suit against the company after adjudication as a saving act against the limitation of the twelfth clause, as such cases are probably not numerous, and may rest on facts peculiar to themselves.

From what I have already said, it is clear that a negative answer must be given to the first question.

As to the second proposition, where proofs of loss have been furnished either before adjudication to the company, or after to the assignee, but no proof of the claim made in bankruptcy, it seems to me that if the assured has furnished his proof of loss, and his loss has been adjusted, the amount determined and agreed upon before the petition in bankruptcy is filed, and while the company is acting through its officers, a suit may afterwards be maintained upon such adjustment for a balance struck on settlement. The parties have agreed upon the amount due under the policy while they were both competent to make such agreement, and a suit may be maintained on such agreement at any time within the statutory limitation. And I am of opinion that if the loss has been duly and regularly adjusted in good faith, before the company is adjudicated a bankrupt, the claim can be proven like any other debt, without regard to the year clause of the policy. But if the proofs of debt were not submitted or acted upon until after the petition is filed in bankruptcy, I think that, while the assignee may examine and pass upon such proofs for certain purposes, he cannot make an adjustment or agreement to pay upon which an action could be maintained, and the assured, in order to preserve his claim, must not only present his proofs under the ninth clause, but must also make his proof in bankruptcy, as the substitute or equivalent for the commencement of a suit within twelve months under the twelfth clause. The principle on which I hold that an adjustment of the loss by the company is a waiver of the year clause, is, that the law will imply a promise by the company to pay the sum at which the loss is adjusted as a new contract arising out of the old one; but this principle does not apply to the assignee, as he has no right to make an express promise of that kind, and the law will not imply one against him from what he may do. I, therefore, think that when the assured has furnished his proofs of loss to the assignee, but has failed to follow them up by proofs of his claim in bankruptcy, his claim is barred by the year clause.

As to the third proposition, where no proofs of loss have been furnished to the company or assignee, but the assured has proven up his loss as a debt against the estate in bankruptcy, under the rule of the Bankrupt Court. This case is similar in principle to the bringing of a suit against the company for a loss on a policy without compliance with the ninth clause.

As I have said before, a company while in control of its affairs may waive the proofs required by the ninth clause, and cannot afterwards insist upon such proof as a condition precedent to bringing a suit; and in cases where there is clear evidence of a waiver of the preliminary proof shown in the proof of debt, I think the debt should be allowed, subject to the right of the assignee to have inquiry made into all the facts touching such alleged waiver; or, to illustrate my meaning, if suit is brought on a policy, the plaintiff must aver and prove that he has given notice and proof of loss as required by the ninth clause, and aver and prove a waiver of such notice and proofs. When he substitutes proof of a claim in bankruptcy for such suit, he must show either compliance with the ninth or a waiver of it; and if the waiver is aptly alleged, and stands the ordeal of investigation as to whether it was regularly made in good faith, the assignee should pay the policy. But if there is no evidence of waiver by the company while it had the right to make such waiver, it appears very clear to me the assignee has no right to pay the claim unless the assured shows that he has complied with the prerequisites of the ninth clause, and the allegations of the assured in that regard may be inquired into by the assignee, and if it appears that the proofs of loss have not been duly furnished, or waived, he should not pay the claim.

The proper practice in cases where the assignee wishes to contest any claim of the nature referred to under either of the foregoing propositions, is to ask that the claim be expunged under the thirty-fourth rule of the general orders in bankruptcy, and proceed as in that rule directed.

SUPREME COURT OF MICHIGAN.

CRIMINAL LAW — ARSON — HUSBAND AND WIFE.

SNYDER v. *THE PEOPLE.*

At the common law, arson of a dwelling-house consisted in the felonious burning of the dwelling-house of another, by which was meant a house in the occupation of some other person than the party accused.

A wife could not be guilty of arson in burning the dwelling of her husband, nor a husband in burning the dwelling of the wife, which they jointly occupy.

The statutes which vest in married women the complete control of their property, with right to convey as if sole, do not take from the husband his marital rights any further than they expressly purport to. So long as he resides with the wife in her dwelling-house, he is there by right, and holds with the wife a rightful possession.

COOLEY, J. — The plaintiff in error was informed against for arson, which is charged to consist in the felonious burning in the night-time of the dwelling-house of Mary A. Snyder. On the trial it appeared that Mary A. Snyder was his wife, and defendant (below) insisted that he could not be guilty of arson in burning her house. He also claimed to be the owner of the house in fact, and this claim was submitted to the jury, who found against him. The prosecution, on the other hand, gave some evidence tending to show that defendant had separated himself from his wife, and given up his residence in the State. This evidence, however, did not

become important on the trial, as the court instructed the jury that a husband might be convicted of arson in burning his wife's dwelling-house, though residing with her, and defendant was convicted accordingly.

The statute provides that "every person who shall wilfully and maliciously burn in the night-time the dwelling-house of another," &c., shall be punished, &c. (Comp. L., sec. 5745.) There are numerous decisions as to what is meant by the *dwelling-house of another* as well at the common law as under like statutes to our own. Arson is an offence against the habitation, and regards the possession rather than the property. (*State* v. *Toole*, 29 Com., 344.) The house, therefore, must not be described as the house of the owner of the fee, if in fact, at the time, another has the actual occupancy; but it must be described as the dwelling-house of him whose dwelling it then is. (2 East. P. C., 1034; 4 Bl. Com., 220; Whart. Cr. L., sec. 1638; 2 Bish. Cr. L., 2d ed., sec. 24; *Holme's case*, Cro. Car., 376; *Spalding's case*, 1 Leach, 258; *Commonwealth* v. *Wade*, 17 Pick., 395.) Even, it seems, though the occupation be wrongful. (*Rex* v. *Wallis*, 1 Mood C. C., 344; *State* v. *Toole*, 29 Com., 344.) It followed that a lessee could not be guilty of the felony in burning the premises occupied by him as such. (2 East. P. C., 1029; 2 Russ. on Cr., 550; *McNeal* v. *Woods*, 3 Blackf., 485; *State* v. *Lym*, 12 Com., 487; *State* v. *Fish*, 3 Dutch., 323; *State* v. *Sandy*, 3 Ired., 570; 3 Greenl. Ev., sec. 55;) while the landlord during such occupation might be, (2 East. P. C., 1023–4; *Sullivan* v. *State*, 5 Stew. and Port., 175.) A jail, it has been held, may be described as the dwelling-house of the jailer living with his family in one part of it. (*People* v. *Van Blarcom*, 2 Johns, 105; *Stevens* v. *Commonwealth*, 2 Leigh., 683.) And it seems that the wife, because of the legal identity with the husband, cannot be guilty of the offence in burning the husband's dwelling, even though at the time living separate from him. (*March's case*, 1 Mood. C. C., 282.) This would doubtless be so held wherever the wife's domicil is regarded as in law as identified with the husband's, which for many purposes is no longer the case when they live separate.

It must be evident, from this summary of the law on this subject, that if the husband, living with his wife, has a rightful possession jointly with her of the dwelling-house which she owns and they both occupy, he cannot, by common law rules, be guilty of arson in burning it. It remains to be seen whether the statutes have introduced any changes which would affect the case.

The statutes upon which the question arises are those for the protection of the rights of married women. But it is to be observed that those do not in terms go beyond the ensuring to the wife such property as she may own at the marriage and acquire afterwards, and the giving to her the power to protect, control, and dispose of the same in her own name, and free from the interposition of the husband. None of them purports to operate upon the family relations: none of them takes from the husband his marital rights except as they pertain to property, and none of them relieves him from responsibilities, except as they relate to the wife's contracts and debts. He is still under the common law obligation to support the wife, and the services of the wife, which at the common law were regarded as the consideration for this support, are still supposed to be performed in his behalf and in his interest, except where they are given to her individual estate or separate business. The wife has a right to receive

her support at the husband's domicil unless he has lost it by misbehavior, and husband and wife together have a joint interest in and control of the children, which they cannot of right sever, and which are not even in contemplation of law regarded as distinct, though the courts are sometimes compelled to treat them as if they were so, when difficulties arise which make legal intervention essential to the protection and welfare of the children. As regards her individual property the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute by such family settlement as should give her the like ownership and control. At the common law the power of independent action and judgment was in the husband alone: now it is in her also for many purposes; but the authority in her to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity than the corresponding authority in him. She is still presumptively his agent to provide for the household, and he is not deprived of the rights or relieved of the obligation of head of the household except as by their dealings, an intent to that effect is indicated.

So far from an intent having been manifested on the part of the legislature to regard the family as simply a voluntary association of two persons legally independent of each other, with their progeny, several of the changes have been in the direction of a unification of interests. Thus, the husband is deprived of all authority to sell, mortgage, or otherwise change the homestead without the wife's consent, though his title thereto may be complete and absolute. (Const., Art. 16, secs. 2 and 3; *Dye* v. *Mawn*, 10 Mich., 231; *McKee* v. *Wilcox*, 11 Mich., 358; *Ring* v. *Burl*, 17 Mich., 465.) He is also precluded from selling or encumbering such personal chattels as are exempt by law from execution, unless with her assent, (Comp. L., sec. 4465;) and if he shall attempt to do so, she may bring action to recover the same in her own name. (Comp. L., sec. 3294.) These powers and privileges in respect to the husband's property are not conferred on the wife for her own benefit exclusively, or in order to give her interests independent of the husband; but they are given her for the benefit of the whole family, in order that they may not be deprived of the reasonable means of support which the law has endeavored to save to them, and to the end that they may be kept together as a family if such shall be their desire. And after the death of the husband and father, the family unity is still regarded in the protection which is given to the homestead. (Const., *ret supra.*)

We have said that the wife is entitled to support at the husband's domicil, and, as we have seen, she may prevent his disposing of it. The statute has not given him a corresponding right to impede or preclude conveyances or incumbrances by the wife; but, nevertheless, so long as they occupy together, he is not to be considered as being upon the premises by sufferance merely. He is there by right, as one of the legal unity, known to the law as a family, as having important duties to perform and responsibilities to bear in that relation which can only be properly and with amplitude performed and borne, while the legal unity represents an

actuality; as having rights in consort and offspring which can only be valuable reciprocally while the one spot, however owned, shall be the home of all, and in many ways he still represents the family in important relations of society and government. Some of the legislation on the subject is exceedingly crude; some of it has injudiciously given powers to the wife in the disposition of property which it has prudently denied to the husband, but none of it makes the husband a stranger in law in the wife's domicil. The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling-house, the *domus*, is that of both.

If, therefore, the husband shall be guilty of the great wrong to his wife and family of setting fire to the house they inhabit, he is no more guilty of arson in so doing than the wife was at the common law for a like wrong to the dwelling-house of the husband. The case is a very proper one for a penal statute, but none has yet been enacted to meet it. The house in legal contemplation, as regards the offence under consideration, is the dwelling-house of the husband himself.

But in so holding we do not decide that if the family relation is broken up, in fact, and the husband and wife are living apart from each other, whether, under articles of separation or not, the same exemption from criminal liability can exist. There is much reason for holding that the wife's dwelling-house can be considered that of the husband only, while he makes it such in fact, and that there is no such legal identity as can preclude her house being considered in legal proceedings against him as the dwelling of "another" when it is no longer his abode. That case was not fairly presented upon this record, and was barely alluded to on the argument; and it must be left for the proper consideration when it becomes necessary to decide it. We confine our attention now to the case of a husband in the practical exercise of the right to reside with his family in the wife's dwelling-house, which the wife at the same time practically concedes. In such a case the dwelling-house cannot be said not to be that of the husband.

It follows that the judgment was erroneous, and it must be reversed, and a new trial ordered.

The other Justices concurred.

SUPREME COURT OF OHIO.

[22 Ohio State Reports.]

NATIONAL BANK — USURY — STATE LAW — PRINCIPAL AND SURETY.

FIRST NATIONAL BANK OF COLUMBUS v. *GARLINGHOUSE.*

1. *The discounting of a note in this State by a National bank at a usurious rate of interest does not avoid the note* in toto, *but only to the extent of the interest.*
2. *The statute of this State, of March* 19, 1850, *entitled "An act to restrain banks from taking usury," was intended to operate on banking institutions in this State whose authority to discount and purchase notes, &c., is subject to control by the legislation of this State, and has no application to banking institutions existing and exercising their powers under the authority of Congress.*

3. *The discounting of a note for the principal maker, at a usurious rate of interest, will not discharge the sureties, where there is no intention to practise a fraud on them, and in the absence of any express agreement or understanding that the note was to be used only at a given rate of discount. In such case the sureties must be held to have trusted the principal as to the terms on which the note might be discounted.*

[See *National Exchange Bank of Columbus* v. *Moore*, 2 A. L. T. B. R., 74; *Lamb* v. *First National Bank, &c.*, 5 A. L. T. R., 488.]

NATIONAL BANK — INTEREST — STATE BANK — CONSTRUCTION OF SEC. 13 OF ACT.

SHUNK v. *FIRST NATIONAL BANK OF GALION.*

1. *Under the thirteenth section of the act of Congress of June* 3, 1864, *commonly called the National Currency Act, National banks, located in a State where by the laws thereof a certain rate of interest is limited for banks of issue, organized under State laws, are allowed to take, receive, reserve, and charge interest at the rate so limited, and no more, although a greater rate is allowed by the laws of such State to parties other than such State banks.*
2. *The provisions of the act of the General Assembly of this State, passed May* 4, 1869, (66 O. L., 91,) *viz., "that the parties to any bond, bill, promissory note, or other instrument of writing for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest on the amount of such bond, bill, note, or other such instrument of writing, at any rate not exceeding eight per centum per annum, payable monthly," were not intended to embrace banks of issue organized under State laws, whose powers in relation to taking and charging interest on loans and discounts were conferred and limited by prior and special enactments.*
3. *The thirteenth section of the National Currency Act provides that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon."*

Held, *That, under this provision, such taking or charging a rate of interest greater than six per centum per annum in advance, by a National bank located in this State, forfeits all interest accruing on such note, bill, or other evidence of debt, after maturity and before judgment thereon, as well as interest accruing before the maturity thereof.*

The judgment of the District Court affirming the judgment of the Common Pleas Court is reversed, and unless the defendant in error, within thirty days, remit from the judgment of the Court of Common Pleas all interest included therein, the judgment of said court will also be reversed.

Welch, J., dissented from the second proposition of the syllabus.

NATIONAL BANK — CONSTRUCTION OF SEC. 8 OF ACT.

SHINKLE v. *FIRST NATIONAL BANK OF RIPLEY.*

The words "by discounting and negotiating promissory notes, drafts, bills of exchange," &c., contained in the eighth section of the National Currency Act of 1864, *are not to be read as limiting the mode of exercising the "incidental powers" necessary to carry on the business of banking, but as descriptive of the kind of "banking" which is authorized; and the true reading of the petition is, that the company may carry on*

banking "by discounting and negotiating promissory notes, drafts, bills of exchange," &c., and may exercise "all such incidental powers as shall be necessary" for that purpose.

Four persons being jointly indebted to one bank in two several sums, and to another bank in one sum, by mutual agreement between all parties, the notes which the banks respectively held for the debts were given up, and the debtors, each, executed his individual note and mortgage for such part of the aggregate sum as it was agreed among the debtors he should secure and pay; and in pursuance of said agreement the new notes and mortgages were drawn and made payable to a third person, and by him indorsed to one of the two banks. In an action against one of the debtors, upon his note and mortgage, by the bank to which it had been so assigned, Held, *That the transaction was a payment, and not a mere renewal of the old notes; that there was a sufficient consideration to support the new notes and mortgages; and that the bank had authority, by the provisions of the National Currency Act, to make the arrangement, and take the new notes and mortgages in that form and manner.*

In such action interest is recoverable upon the new note, although the old notes bore usurious interest, which was thus paid in full; and no offset or deduction can be allowed to the defendant on account of such usurious interest, in an action brought against him after the expiration of two years from the date of such payment, the period limited by the National Currency Act, for recovering back double the amount of usurious interest paid.

CRIMINAL LAW — SUBORNATION OF PERJURY DEFINED — GOOD CHARACTER OF ACCUSED.

STEWART v. *THE STATE.*

1. *An essential element in the crime of subornation of perjury is the knowledge or belief on the part of the accused, not only that the witness will swear to what is untrue, but also that he will do so corruptly and knowingly.*
2. *An indictment for subornation of perjury, setting forth in due form of law the crime of wilful and corrupt perjury by the suborned witness, and then averring that the defendant feloniously, wilfully, and corruptly did persuade, procure, and suborn the witness to commit "said perjury in manner and form aforesaid," sufficiently charges the defendant with knowledge that the witness would corruptly and knowingly swear to that which was false.*
3. *By the laws of Indiana the Court of Common Pleas has jurisdiction of divorce cases, and, by the decision of her courts, decrees in divorce are conclusive and binding between the parties, irrespective of their residence at the date of the divorce, or of the petition therefor. To entitle a party to a divorce, however, he is required to state in his petition, and prove to the satisfaction of the court, that he is a resident of the county, and that he has resided in the State one year. Provision is also made by law for bringing in the absent defendant by publication of notice. In a case where such petition had been filed in said court by a non-resident, falsely alleged that he was such resident, and in which notice to the absent defendant had been duly published, the deposition of a witness was taken before a proper officer in Ohio, proving the fact of residence, and the causes of divorce specified in the petition.*

Held, *That the oath and deposition of the witness were not extra-judicial or unauthorized by law, and that perjury may be assigned upon them.*

4. *In a criminal case it is error to instruct the jury that evidence of the defendant's good character is not to be considered by the jury, or made available to the defendant, except in doubtful cases; the true and proper rule being to leave the weight and bearing of such evidence to the jury.*

SUPREME COURT OF THE UNITED STATES.

[December, 1872.]

INTER-STATE COMMERCE — UNCONSTITUTIONALITY OF TAXATION BY STATE OF FREIGHT CARRIED INTO OR OUT OF ITS JURISDICTION.

P. & R. R. R. CO. v. *PENNSYLVANIA.*

A State cannot tax freight carried from another State into its jurisdiction or from its own jurisdiction into that of another State.

Opinion of the Court by Mr. Justice Strong:—This is a writ of error to the Supreme Court of Pennsylvania, and we are called upon to review a judgment of that court affirming the validity of a statute of the State, which the plaintiffs in error allege to be repugnant to the Federal Constitution.

The statute was enacted on the 25th of August, 1864, and was entitled "An act to provide additional revenues for the use of the commonwealth." Its first section enacted "that the president, treasurer, cashier, or other financial officer of every railroad company, steamboat company, canal company, and slackwater navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank-road companies, and bridge companies, shall, within thirty days after the first days of January, April, July, and October of every year, make return in writing to the auditor-general, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through, or upon the works of said company, for the three months immediately preceding each of the above-mentioned days; and each of said companies, except as aforesaid, shall, at the time of making such return, pay to the State treasurer, for the use of the commonwealth, on each two thousand pounds of freight so carried, tax at the following rates: 'first, on the product of mines' (and other articles), 'two cents;' 'second,' on another class of articles, three cents; and on a third class, five cents." The section further enacted, that "when the same freight shall be carried over different but continuous lines, said freight shall be chargeable with tax, as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof; corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls received for such use, are authorized to add the tax hereby imposed to said tolls, and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements. Provided that every company now or hereafter incorporated by this commonwealth, whose line extends into any other State, and every corporation, company, or individual of any other State, holding and enjoying any franchises, property, or privileges whatever in this State, by virtue of the laws thereof, shall make returns of freight, and pay for the freight carried over, through, and upon that portion of their

lines within this State, as if the whole of their respective lines were within this State."

It is the validity of this statute which is now assailed, and the case we have before us presents the question whether, so far as it imposes a tax upon freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the State, it is not repugnant to the provision of the Constitution of the United States, which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several States," or in conflict with the provision that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question is a grave one. It calls upon us to trace the line, always difficult to be traced, between the limits of State sovereignty in imposing taxation, and the power and duty of the Federal Government to protect and regulate inter-State commerce. While, upon the one hand, it is of the utmost importance that the States should possess the power to raise revenue for all the purposes of a State government, by any means, and in any manner not inconsistent with the powers which the people of the States have conferred upon the General Government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which defeats the avowed purposes of the Federal Constitution, or which assumes to regulate or control subjects committed by that Constitution exclusively to the regulation of Congress.

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce* v. *New York City*, 2 Black, 920; in the *Bank Tax Case*, 2 Wallace, 200; *Society for Savings* v. *Coite*, 6 Wall., 594; and *Provident Bank* v. *Massachusetts*, 6 Wallace, 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax; upon what did the burden really rest, not upon the question from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the act of August 25, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer, for the use of the commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates.

And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines, thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The State treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, nor their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway, but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can therefore add the tax to the charge for transportation without further authority. (Vide *Boyle* v. *The Reading Railroad Company*, 54 Penna. State, 310; *Cumberland Valley Railroad Company's Appeal*, 62 Penna. State, 218.) In view of these provisions of the statute, it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State treasury is in effect only a tax-gatherer. The practical operation of the law has been well illustrated by another when commenting upon a statute of the State of Delaware, very similar to the one now under consideration. He said, "The position of the carrier under this law is substantially that of one to whom public taxes are farmed out —who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is, that, in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by law, as upon the carrier under this act; also, that different means are provided for raising

the tax out of those ultimately chargeable with it." (Chancellor Bates in *Clarke* v. *Phil., Wil. & Balt. R. R. Co.*)

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of inter-State commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. In his work on the Constitution, sec. 1057, Judge Story asserts that the sense in which the word commerce is used in that instrument, includes not only traffic, but intercourse and navigation. And in the *Passenger Cases*, 7 How., 416, it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

Then, why is not a tax upon freight transported from State to State a regulation of inter-State transportation, and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines. It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a

duty for allowing merchandise to enter or to leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other State, may be placed upon a canal, railroad, or steamboat, within the State for transportation any distance, either into or out of the State, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in inter-State trade. We are not at this moment inquiring further than whether taxing goods carried is a regulation of carriage. The State may tax its internal commerce, but if an act to tax inter-State or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation, because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the State and by virtue of franchises granted by the State; in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the State may order to be paid into her treasury. We are asked, if the works were in her own hands, if she were the owner of them, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to existing tolls and franchises?

That this argument rests upon a misconception of the statute is to our minds very evident. We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways. That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the State's eminent domain. It is laid upon those who deal with the owners of the highways or means of conveyance. The State is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals, the State has no title to their income, except so far

as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered, or facilities furnished to a passenger or transporter. These are not rendered or furnished by the State. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this act is therefore not a toll. It is not exacted in compensation for the use of the roadway; and if it were, the right to make terms for the use of the roadway is in the grantee of the franchises, not in the grantor. But, in truth, the State has no more right to demand a portion of the tolls which the grantees of her franchises may exact, than she would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach. All this, however, is abstract and apart from the case before us. That the act of 1864 was not intended to assert a claim for the use of the public works, or a claim for a part of the tolls, is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the State or not, and whether exercising privileges granted by the State or not. It reaches freight passing up and down the Delaware and the Ohio rivers, carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same, whether the transportation be long or short. It must therefore be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the State — a burden upon inter-State intercourse.

If then this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of inter-State commerce, the conclusion seems to be inevitable, that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court, it was said to have been so entirely vested in Congress, that no part of it can be exercised by a State. (*Gibbons* v. *Ogden*, 9 Wheaton, 1; *Passenger Cases*, 7 How., 283.) It has, indeed, often been argued, and sometimes intimated by the court, that so far as Congress has not legislated on the subject, the States may legislate respecting inter-State commerce. Yet, if they can, why may they not add regulations of commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and inter-State commerce is conferred upon the Federal legislature by the same words. And certainly it has never yet been decided by this court, that the power to regulate inter-State, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws alleged to be regulations of commerce among the States have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such as in *Gilman* v. *Philadelphia*, 3 Wall., 713, it was said, "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However

this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted, are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. (*Cooley* v. *Port Wardens*, 12 How., 299; *Gilman* v. *Philadelphia*, *supra*; *Crandall* v. *The State of Nevada*, 6 Wall., 42.) Surely, transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of western States may thus be effectually excluded from eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal Government.

In *Almy* v. *The State of California*, 24 How., 169, it was held by this court, that a law of that State imposing a tax upon bills of lading for gold or silver transported from that State to any port or place without the State, was substantially a tax upon the transportation itself, and was, therefore, unconstitutional. True, the decision was rested on the ground that it was a tax upon exports, and subsequently, in *Woodruff* v. *Parham*, 8 Wall., 123, the court denied the correctness of the reasons given for the decision; but they said at the same time, the case was well decided for another reason, viz., that such a tax was a regulation of commerce — a tax imposed upon the transportation of goods from one State to another over the high seas in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*, 6 Wall., 42, and with the authority of Congress to regulate commerce among the States.

In *Crandall* v. *The State of Nevada*, where it appeared that the Legislature of the State had enacted that there should "be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and required the proprietors, owners and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that though required to be paid by the carriers, the tax was a tax upon passengers for the privilege of being carried out of the State, and not a tax on the business of the carriers. For that reason, it was held that the law imposing it was invalid, as in conflict with the Constitution of the United States. A majority of the court, it is true, declined to rest the decision upon the ground that the tax was a regulation of inter-State commerce, and therefore beyond the power of the State to impose, but all the judges agreed that the State law was unconstitutional and void. The chief justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the State legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides

that a State cannot tax persons passing through or out of it. Inter-State transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another, or a State tax upon inter-State transportation of passengers is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter, because of such transportation.

But while holding this, we recognize fully the power of each State to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that inter-State intercourse, trade or commerce be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania, of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

The judgment of the Supreme Court of the State is therefore reversed, and the record is remitted for further proceedings, in accordance with this opinion.

Mr. Justice SWAYNE.—I dissent from the opinion just read. In my judgment, the tax is imposed upon the business of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

I am authorized to say that *Mr. Justice* DAVIS unites with me in this dissent.

SUPREME COURT OF OHIO.

[21 OHIO STATE REPORTS.]

INSURANCE—CONSTRUCTION—"EXPLOSION" DEFINED.

UNITED LIFE, FIRE, AND MARINE INSURANCE CO. v. *FOOTE.*

A policy of insurance against fire excepted from the risk any loss by an explosion. In an action upon the policy, it appeared that an explosive mixture of whiskey vapor and atmosphere had come in contact with the flame of a gas-jet, from which it ignited, and immediately exploded, whereby a fire was set in motion, which destroyed the insured property. Held, *that in such case it cannot be said that the destruction was caused by a fire within the meaning of the policy, but, on the contrary, that the loss was by fire occasioned by the explosion.*

In construing such policy wherein the exception embraces "any loss or damage occasioned by, or resulting from, any explosion whatever," the exception must be taken and held to include all loss and damage occasioned by any fire of which an explosion was the efficient cause.

Where such exception provided that the underwriter would not be liable for "any loss or damage occasioned by, or resulting from, any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor," and the property insured is destroyed by a fire occasioned by the explosion of one of the explosive substances named, and notwithstanding it is made to appear that at the time of taking the risk, such explosion, from the nature of the property insured, was in the contemplation of the parties, such loss falls within the purview of the exception, unless the particular peril by which the property was destroyed was expressly insured against, and a special premium paid therefor.

Lincoln, *Smith Warnock*, and *Stephens*, for Plaintiff in Error.

Matthews, *Ramsey*, and *Matthews*, for Defendants in Error.

McILVAINE, J.— This proceeding is prosecuted to reverse a judgment rendered by the Superior Court of Cincinnati, at General Term, reversing a judgment rendered at Special Term.

The original action was brought, by the defendants in error, (who were plaintiffs therein,) against the plaintiff in error, (defendant therein,) to recover the amount of a policy of insurance, issued by the defendant to the plaintiffs, on the 9th of March, 1867, for a year, upon a stock of merchandise contained in a building of the plaintiffs' situate in the city of Cincinnati, which, together with the building, was destroyed by fire on the 11th day of April, 1867.

By the terms of the policy it appears that the plaintiffs were insured against "loss or damage by fire to the amount of five thousand dollars on their stock of merchandise, consisting principally of liquors, fixtures, tools, and office furniture, contained in their brick building, situate on the southwest corner of Congress and Kilgour Streets, Cincinnati, Ohio, and occupied by them as a liquor store, with privilege of rectifying and manufacturing fine spirits by steam not generated in the building."

The principal defence arose under one of the conditions of the policy, which is in these words:

"VII. This company is not liable for loss or damage by lightning or tornado, unless expressly mentioned or insured against; but will be responsible for loss or damage to property consumed by fire occasioned by lightning. Nor will this company be responsible for any loss or damage to property consumed by fire happening by reason of, or occasioned by, any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, nor where the loss is occasioned or superinduced by fraud, dishonesty, or criminal conduct of the insured, *nor to any loss or damage occasioned by, or resulting from, any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against, and special premium paid therefor.*"

The plaintiffs counted upon the undertaking in the policy, and stated the loss to be by fire.

The answer set up the above condition for a *first* defence, and averred that the said fire, loss, and damage referred to in the petition, were solely occasioned by, and resulted from, an explosion caused by some explosive substance, and that the same was not expressly insured against, nor was a special premium paid therefor, and it denied any loss within the terms and meaning of the policy.

The answer also set up, for a *second* defence, that the plaintiffs did, after

the issuing of the policy and before the loss, carry on and exercise *within* the building, up to the time of the fire, the trade and business of distilling and manufacturing spirits by steam generated *in* the said building, contrary to the provision of the policy which is set out; and by an additional answer, filed by leave of court, the defendants, for a *third* defence, pleaded that the plaintiffs had in operation in the building, up to the time of the fire, three large stills, which greatly increased the risk, and that these stills were concealed from them, and that they had no knowledge of the same. Replies were filed to these answers, putting the same in issue.

The issues of fact arising upon the defences, set up by the defendant below, were tried, upon submission, by the parties, by the judge at Special Term, who found in favor of the defendant upon the first defence, and in favor of the plaintiffs upon the second and third defences.

A motion to set aside the finding and for a new trial was made on behalf of the plaintiffs, and overruled. A bill of exceptions was then taken, setting out all the evidence, and judgment was rendered for the defendant.

A petition in error was filed in the General Term, and the judgment was reversed.

To reverse this judgment of reversal, and restore the judgment at Special Term in favor of the defendants below, it prosecutes the present petition in error. If it prevails, the litigation is ended by a final judgment; if it fails, the cause will stand for a new trial.

The main question for decision by this court is, whether the Superior Court in General Term erred in law in reversing the judgment at Special Term.

And that question may be stated in this form: Did the facts proved on the trial at Special Term, when considered in connection with the terms of the eighth condition to the policy fairly construed, clearly sustain the finding of the court in favor of the defendant upon its first defence?

I do not propose to repeat in detail the testimony set out in the record, but will content myself in stating the conclusions of fact, which in our opinion are clearly drawn from the testimony. It is proper to say, however, that the testimony in this case is remarkably free from contradictions. The only doubt that can possibly arise upon the evidence is as to the proper inferences to be drawn from facts clearly proven; but these inferences, we think, are quite evident.

The testimony shows that, at the time of taking out the policy, and until the time of the fire, the plaintiffs were engaged in the business of rectifying whiskey, and manufacturing fine spirits by the use of steam, in the building occupied by them as a liquor store, and in which the insured stock of merchandise, consisting principally of liquors, etc., was kept. The size of the building was sixty by one hundred and eighty feet, and was four stories high. There was communication between the stories through open stairways and hatches. The business of rectifying was carried on in the basement story, where the stills — large metallic vessels — were located. The upper stories were chiefly used for storage of liquors and cooperage. The process of rectifying was conducted as follows: The raw spirits or liquor was conveyed by means of pipes, called leaders, from tubs situate in the upper stories to the stills below; when the stills were thus charged, the liquor therein was converted into vapor by means of steam which passed through the stills in copper pipes, called worms; the vapor thus

evolved was conducted by other pipes to a condenser, where it was reduced to a liquid state.

The vapor evolved in the process of rectification is an inflammable substance. It readily mixes with the atmosphere, and when so mixed in certain proportions is explosive, and when such mixture is brought into contact with flame it explodes. On the morning of the fire a large still was being charged through a leader about two inches in diameter, which passed into its still through a *vacuum valve*, (an aperture in the still near its top,) the diameter of which was about four inches. At the same time steam was passing through the worm, converting the liquor in the still into vapor, which escaped through the vacuum valve into the still-room, and thence no doubt into other parts of the building. The process of thus charging the still, accompanied with the discharge of vapor, had continued for some time — perhaps an hour preceding the fire. During the progress of this process, two jets of gas were burning in the still-room, one a distance of three or four feet from the vacuum valve, and the other in another part of the room. There was no other fire or flame in the room or in the building at the time.

Such being the circumstances, an explosion took place in the still-room A sudden and violent combustion of the vapor, accompanied with a noise — described by one witness as being like the crack of a gun; by another, as if a bundle of iron had been thrown on the pavement; by another, as a crash; and by another, as a gush of fire, and at the same instant the flame was driven through a doorway into another building, whereby a witness was badly burned. Immediately after the explosion, a flame was discovered escaping from the still through the vacuum valve, and at the same time the building was discovered to be on fire throughout the several stories.

From these facts and circumstances we think it was clearly shown that the fire, by which the building and stock of merchandise insured were consumed, was occasioned by and resulted from an explosion of spirit vapor mixed with atmosphere, and that the explosion was caused by the mixture coming in contact with the burning gas-jet.

1. The first question which we notice particularly is this: Was the explosion, which in fact occurred, such, in degree of violence, as was contemplated by the parties to the policy?

The word "explosion" is variously used in ordinary speech, and is not one that admits of exact definition. Its general characteristics may be described, but the exact facts which constitute what we call by that name, are not susceptible of such statement as will always distinguish the occurrences. It must be conceded that every combustion of an explosive substance whereby other property is ignited and consumed, would not be an explosion within the ordinary meaning of the term. It is not used as the synonym of combustion. An explosion may be described generally as a sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. But the rapidity of the combustion, the violence of the expansion, and the vehemence of the report, vary in intensity as often as the occurrences multiply. Hence, an explosion is an idea of degrees, and the true meaning of the word, in each particular case, must be settled, not by any fixed standard or accurate measurement, but by the common experience and notions of men in matters of that sort. In this case, although the building was not rent asunder, or the property

therein broken to pieces, there was a sudden flash of flame, a rush of air, and a report like the "crack of a gun," which certainly brings the occurrence within the common meaning of word as used in many instances. "Any explosion whatever" is the phrase used in the condition to the policy, and it is qualified by the context only to the extent that it must be an "explosion" of some "explosive substance, and of sufficient force as to result in loss or damage to the property insured." And these characteristics we have found to exist in the occurrence that resulted in the loss of the insured property.

2. It is claimed that the fire which destroyed the property insured did not result from the explosion, but, on the contrary, that the explosion was incident to and caused by the fire, which, if there had been no explosion, would have accomplished the whole loss and damage; or, at least, that such inference may be drawn from the facts in the case as fairly and as legitimately as contrary inferences.

The proof unquestionably shows that the origin of the fire and the explosion was simultaneous. It may be true, in a strictly scientific sense, that all explosions caused by combustion are preceded by a fire. The scientist may demonstrate, in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precedes the explosion; but the common mind has no conception of such combustion, as a fact independent of the explosion, where they concur in such rapid succession that no appreciable space of time intervenes. The terms of this policy must be taken in their ordinary sense; and we are satisfied that the proofs show, according to the ordinary sense and understanding of men in reference to such matters, that the explosion occasioned the fire which destroyed the property insured; or, in other words, that the loss resulted from an explosion within the true intent and meaning of this policy.

It is true that the explosion was caused by a burning gas-jet, but that was not such fire, as contemplated by the parties, as the peril insured against. The gas-jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a protection; although it was a possible means of putting such destructive force in motion, it was no more the peril insured against than a friction match in the pocket of an incendiary. The conclusions of fact to which we thus arrive, are mere inferences from other facts,— facts, however, about which there was no conflict in the testimony,— yet they are so manifestly true, that we think it was error of law, under our statute, to reverse the judgment rendered thereon at the Special Term of the Superior Court, upon the strength of contrary inferences drawn from the same facts by the reviewing court.

3. The next question arises upon the terms of the policy and is one of construction purely. Was it intended, by the provisions of the seventh condition, to exempt from the risks assumed by the policy losses *by fire* occasioned by an explosion?

It is claimed that the clause exempting losses by explosion taken alone, or constructed in connection with other clauses in the condition, does not show such intention. It is true that the words "by fire," or their equivalent, are omitted in this clause, though expressed in some of the former clauses. The foundation point, however, in construing this condition, is

found in the general undertaking of the policy. It will be observed that the underwriter undertook to insure against loss and damage by fire only; but, nevertheless, against loss and damage by fire generally, and the maxim, *causa proxima, non remota, spectatur*, applies. Now, we think, without doubting, that the purpose of inserting this condition was to relax the rigor of this maxim, and exempt from the general risk of the policy certain losses, which would otherwise fall within its scope and meaning. The first clause of the condition provides that "this company is not liable for loss or damage by lightning or tornado, unless expressly mentioned and insured against." If this were the whole of the clause, and it were not understood that the loss and damage referred to were such as might result from *fire occasioned by lightning or tornado*, it would be utterly meaningless and nugatory, for the reason that the underwriter had not undertaken to insure against lightning or tornado. So far the construction is plain enough, but a difficulty arises from the conclusion of the clause, to wit: "but will be responsible for loss or damage to property consumed by fire occasioned by lightning." The exception to the rule of exemption from loss by lightning appears to be as broad as the rule itself. But I apprehend that a case might arise in which effect and operation could be given to all the terms of this clause, including those which are implied as well as those expressed. At all events, it is perfectly clear that loss and damage by lightning and tornado are not within the expressed risks of the policy, unless a fire supervenes; nor is there anything in the policy from which such risks can be implied.

The condition continues: "Nor will the company be responsible for any loss or damage to property consumed by fire happening by reason of, or occasioned by, any invasion, insurrection, riot, or civil commotion, or any military or usurped power." The exemptions here provided for are expressly limited to losses within the terms of the general risk of the policy. But if such limitation had not been expressed, it would have been implied.

The next clause is as follows: "Nor when the loss is occasioned or superinduced by the fraud, dishonesty, or criminal conduct of the insured." There is no pretext for holding that the loss here contemplated is other than loss by fire, although no such qualification is expressed. Then follows the clause in question, which, to all intents and purposes, is framed like the preceding one: "Nor to any loss or damage occasioned by or resulting from any explosion whatever, whether of steam, gunpowder, camphene, coal-oil, gas, nitro-glycerine, or any explosive article or substance, unless expressly insured against and special premium paid therefor."

Unless there is something in the subject-matter of this clause that indicates that the words "by fire" were omitted for the purpose of showing a design and intention to adhere to and continue the general risk in case an explosion should result in a fire, we think that they or their equivalent should be supplied by implication or construction.

Is such purpose indicated by any fair use of the terms employed?

That a loss, other than combustion, results from an explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only, is a doctrine not only reasonable in itself, but is sustained by authority. (*Waters* v. *La. Mer. Ins. Co.*, 11 Pet., 225; *Scripture* v. *Low. Mut. Fire Ins. Co.*, 10 Cush., 357; *Millauden* v. *N. O. Ins. Co.*, 4 La. Ann., 15.) And it is quite clear that a

loss by fire, which is occasioned by an explosion, is within the like risk. Now, the express terms of this clause are "any loss or damage occasioned by or resulting from any explosion whatever." These terms are certainly comprehensive enough to include both descriptions of loss, whether loss by the explosive force, or loss by superinduced combustion. And that such is their legal effect has been directly decided in the case of *Stanley* v. *Western Ins. Co.*, Law Reports, 1868: 3 Exchequer, 71. It is not necessary at this time to either approve or disapprove, to the whole extent, the doctrine in Stanley's case, as in this case no damage was sustained from the explosion without the intervention of a fire, nor, indeed, was the explosion caused by a fire within the meaning of the policy. But we can find no good reason for doubting that loss and damage by fire, resulting from an explosion, was intended to be exempted by this condition from the general risk of the policy, and are of opinion, therefore, that this clause properly construed should read, "nor any loss or damage by fire occasioned by or resulting from any explosion whatever."

4. It is claimed by defendants in error, that the peril by which the property issued was destroyed was within the exception to the seventh condition; that is, it was "expressly insured against, and special premium paid therefor;" or, in other words, was excepted out of the exception.

The reasoning by which this proposition is sought to be maintained is thus stated:

"The body of the policy covered loss by fire on liquors, etc., with the privilege of rectifying and manufacturing fine spirits by steam not generated in the building. The property insured was whiskey, as well in the process of rectification and manufacture as manufactured—whiskey in the still, as well as spirits in the barrel—the whiskey vapor itself, while passing through the columns to the cooler, or wherever else it might make its way. If it was in this form an *explosive substance or article*, such as is intended by the language of the condition, or if, in the process of manufacture allowed by the policy, it was likely to become such by escape and mingling with the air in the building, then the insurance was upon it, as an agent known to be explosive under certain circumstances likely to happen, and with the express assent of the company to the carrying on of that process, in the course of which its explosive nature would naturally and probably be developed."

The principle sought by this argument to be applied is announced in *Harper* v. *New York City Insurance Co.*, 22 N. Y., 441; *Fitton* v. *Accidental Death Insurance Co.*, 17 Com. Bench, N. S., 112.

In the case of *Harper* v. *New York Insurance Co.*, the condition exempted the company from liability *for loss occasioned by camphene*. The fire was occasioned by a workman's throwing a lighted match into a pan upon the floor containing camphene. The risk was upon a printing stock, privileged for a printing-office, camphene not being expressly enumerated. But it was shown that that article was a usual part of such a stock, and its use was therefore authorized. For this reason alone, because it was implicitly insured, it was held that the exception did not apply.

The following extract from the opinion expresses its doctrine:

"A policy can be so framed as to allow the presence of a dangerous article, and even so as to insure its value, while, at the same time, it might exempt the insurer from loss if occasioned by the presence or use of the

article. But I think it would need very great precision of language to express such an intention. When camphene or any hazardous fluid is insured, and its use is plainly admitted, the dangers arising from that source are so obviously within the risk undertaken, that effect should be given to the policy accordingly, unless a different intention is very plainly declared."

In answer to this claim, we say:

1. That the spirit vapor, having escaped from its confinement and passed into the still-room, where it became mixed with atmosphere so as to form an explosive substance, under circumstances that precluded all possibility of reclaiming and utilizing it, was no longer a part of the stock of merchandise insured, and was not under the protection of the policy.

2. If, from the nature of the property insured, the parties, at the time the risk was taken, might reasonably have anticipated the peril by which it was afterwards destroyed, it is reasonable to suppose that such peril was in contemplation at the time, and that they contracted in reference to it. Hence, if the general risk of the policy was expressed in terms broad enough to include the peril, it must be presumed that they intended to do so; and on the other hand, if an exception to the risk was made in terms which fairly and plainly took such particular peril out of the general risk, it must be presumed that they intended to exempt such particular peril from the risk. Again, if it be claimed that there was an exception to such exemption, whereby the particular peril was saved from the exemption and left under the general risk, it is reasonable that the terms of exception should be at least as explicit as the terms of exemption. How is it in this case? The risk was against all loss by fire. The exception from the risk was "any loss or damage occasioned by an explosion of steam, gunpowder, etc." The exception to this exemption was "unless expressly insured against, and special premium paid therefor." Therefore, it only remains to be said, that no loss or damage occasioned by an explosion of any of these substances named was expressly insured against, nor was any special premium paid for any such special risk.

It follows, therefore, that the judgment of reversal rendered at General Term must be reversed, and the judgment rendered at Special Term must be affirmed.

SUPREME COURT OF NEW HAMPSHIRE.

[51 NEW HAMP.]

RAILROAD — RELEASE OF DAMAGES — REMOVAL OF NATURAL BARRIER AND CONSEQUENT DAMAGE — DAMAGE CAUSED BY CONSTRUCTION OF ROAD ON LAND OF ANOTHER.

EATON v. *B. C. & M. R. R.* — *AIKEN* v. *THE SAME.*

A release of all damages on account of the laying out or construction of a railroad through and over the land of the releasor, does not cover damages occasioned to the remaining land of the releasor by the construction of the railroad over the land of other persons. The statutes in force from 1849 *to* 1851, *providing for the assessment of the damages of a land-owner whose land was crossed by a railroad, did not authorize the assessors to*

include the damage which was or might be occasioned to such land-owner by the construction of the railroad over the land of other persons.

A railroad corporation, claiming to act under legislative authority, removed a natural barrier situated north of E.'s land, which theretofore had completely protected E.'s meadow from the effects of floods and freshets in a neighboring river. In consequence of this removal, the waters of the river, in times of floods and freshets, sometimes flowed on to E.'s land, carrying sand, gravel, and stones thereon. Held, *that this was a taking of E.'s property, within the meaning of the constitutional prohibition; and that the legislature could not authorize the infliction of such an injury without making provision for compensation.*

A railroad corporation constructed their road across the farm of E. Damages were assessed under the statute, and paid to E. E. released the corporation from damages on account of the laying out of the road over his land. Northerly of E.'s farm there was a ridge of land completely protecting the farm from the effect of floods and freshets in a neighboring river. Through this ridge, the corporation, in constructing their road, made a deep cut, through which the waters of the river in floods and freshets sometimes flowed, carrying, on one occasion, sand, gravel, and stones upon E.'s farm. Held, *that even if the corporation had constructed their road at said cut with due care and prudence, E. could recover, in an action on the case, such damages as had been caused him in consequence of the corporation's cutting away the ridge north of E.'s farm, and thereby letting the river, in times of freshet, run through this cut and damage E.'s land.*

A. owned the farm between E.'s farm and said ridge. The ridge was about twenty feet wide upon the top, and a small part of it in width was included in A.'s farm, the northerly line of his farm being near the southerly edge of the top of the ridge. In all other respects A.'s case was similar to E.'s. Held, *that even if the corporation had constructed their road at the cut with due care and prudence, A. could recover, in an action on the case, such damages as had been caused him in consequence of the corporation's cutting away the ridge north of A.'s farm, and thereby letting the river, in times of freshet, run through this cut and damage A.'s land.*

Actions on the case, against the Boston, Concord & Montreal Railroad — one brought by Ezra B. Eaton, the other by Milo Aiken, to recover damages done during the freshet of October, 1869, to their respective farms in Wentworth, and alleged to have been occasioned by the construction of the defendants' railroad.

The defendants were duly incorporated by legislative authority, and constructed their road across the farms of the plaintiffs during the years 1849, 1850, and 1851 — the road having been previously surveyed and located. Damages were duly appraised and paid.

Eaton, on March 24, 1851, after the construction of the road, gave the defendants a warranty deed of that part of his farm on which the road is located, and on the same day executed the following release:

"I, the subscriber, do hereby acknowledge that I have received of the Boston, Concord & Montreal Railroad the sum of two hundred and seventy-five dollars, in full for the amount of damages assessed to me by the railroad commissioners of the State of New Hampshire, in conjunction with the selectmen of Wentworth, on account of the laying out of the said Boston, Concord & Montreal Railroad through and over my land; and I do hereby release and discharge the said corporation from said damages."

Aiken, on November 7, 1849, gave the defendants a warranty deed of that part of his farm on which the road is located. Said deed contains the following clause: "And in consideration aforesaid, I hereby release said corporation from all damages, direct or consequential, by reason of the

constructing, maintaining, and using their railroad on and over the land hereby conveyed, and through my said land." This release, and that executed by Eaton, were printed, save names, amounts, &c., which were inserted in blanks left for that purpose.

Northerly of the plaintiffs' farms, which consist of meadow lands lying on Baker's river, there is a narrow ridge of land, some twenty-five feet or more in height, extending from the high lands on the east westerly to said river, completely protecting said meadows from the effect of floods and freshets in said river. Said ridge is about twenty rods wide upon the top, and a small part of it in width is included in the plaintiff Aiken's farm—the northerly line of his said farm being near the southerly edge of the top of said ridge. The plaintiff Eaton's farm lies south of said Aiken's. Through this ridge the defendants, in constructing their road, made a deep cut, through which the waters of said river in floods and freshets sometimes flowed; and the damages sued for were occasioned by the waters flowing through said cut, and carrying sand and gravel and stones upon said Aiken's farm, and over and across it to and upon the farm of said Eaton. The plaintiffs claim that the defendants are liable for the damages so occasioned, although they may have constructed their road at said cut with due care and prudence. The defendants say that they are not so liable. The defendants claim that, under the circumstances of this case, the corporation are not liable for any damages accruing to the plaintiff from a proper construction of their road, and that in constructing the same they were only bound to do it in the usual manner, and so as to make the owners of adjoining land reasonably safe, and with ordinary care and prudence, and that they were not bound to preclude the possibility of damage by reason of such construction.

The parties consented that the foregoing questions be determined by the court, and that afterwards either party may have a trial by jury if desired, without prejudice from anything herein contained.

Upon the foregoing facts appearing, and the parties having stated their positions and claims, the court, *pro forma*, ruled that the plaintiffs would be entitled to recover such damages as have been caused them in consequence of the defendants' cutting away the ridge north of the plaintiffs' farms, and thereby letting the river in times of freshet run through this cut and damage the plaintiffs' land; to which ruling the defendants excepted.

Carpenter and *Flanders*, for the plaintiffs.

H. Bingham, *Burrows*, and *Page*, for the defendants.

SMITH, J.—Eaton's case will be considered first.

It is virtually conceded that, if the cut through the ridge had been made by a private land-owner, who had acquired no rights from the plaintiff or from the legislature, he would be liable for the damages sought to be recovered in this action. It seems to be assumed that the freshets were such as, looking at the history of the stream in this respect, might be "reasonably expected occasionally to occur." The defendants removed the natural barrier which theretofore had completely protected the plaintiff's meadow from the effect of these freshets; and, for the damages caused to the plaintiff in consequence of such removal, the defendants are confessedly liable, unless their case can be distinguished from that of the private land-owner above supposed. Such a distinction is attempted upon

two grounds — first, that the plaintiff has already been compensated for this damage, it being alleged that the defendants have, by negotiation, or by compulsory proceedings, purchased of the plaintiff the right to inflict it; second, that the defendants are acting under legislative authority, by virtue of which they are entitled to inflict this damage on the plaintiff without any liability to compensate him therefor.

In support of the first ground, the defendants rely upon the plaintiff's release, and upon the appraisal of damages under the statute.

The release does not support the defendants' claim. The plaintiff released the defendants from damages on account of the laying out of the railroad through and over his land. The damages which the court ruled that the plaintiff would be entitled to recover were not occasioned by the laying out of the road over the plaintiff's land, but by the construction of the road over the land of other persons. (See *Delaware & Raritan Canal Co.* v. *Lee*, 2 Zabriskie, 243.) The ruling was, that the plaintiff could recover such damages as have been caused him in consequence of the defendants' cutting away the ridge north of the plaintiff's farm.

The defendants contend that the statute, providing for the appraisal of damages, authorized and required the appraisers to take into consideration any and all injury or damage which then, or in the future, might accrue to the plaintiff by reason of the cut through the high ridge, and to include the same in their award; and that therefore the appraisal and subsequent payment furnish a complete bar to this action. The plaintiff concedes that, if the appraisers had authority to include this damage in their award, it must be presumed that they did so. (See *Aldrich* v. *Cheshire Railroad Co.*, 21 N. H., 359.) Whether the appraisers had such authority depends, of course, upon the construction of the statute. By the statute in force when this railroad was built, it is enacted that the commissioners and selectmen "shall assess the damages sustained by the owners of land in the same way and manner as road commissioners in the several counties are now by law required to do." (Comp. Stats., ch. 150, sec. 10.) The road commissioners are to assess the damages sustained by owners of land "as selectmen are required to do." (Comp. Stats., ch. 54, sec. 7.) And selectmen "shall assess the damages sustained by each owner of the land required for such highway." (Comp. Stats., ch. 52, sec. 16; see, also, *Blake* v. *Rich*, 34 N. H., 282, pp. 285, 286; *Dearborn* v. *B. C. & M. R. R.*, 24 N. H., 179, 185, 186.)

What damages are to be awarded by selectmen to owners of land required for a highway? Are they restricted to the damages occasioned by building the highway over such owner's land? or, may they also include the damages done to such owner by reason of the construction of the highway over the land of other persons? It is desirable, in the outset, to ascertain who are entitled to an award of damages under the statute. The term "land required" might, if used in some connections, be construed to include land injuriously affected as well as land actually crossed by the highway; but other clauses in the highway statutes render it quite clear that this term is here used in the latter sense. Thus, when a new highway is petitioned for, the selectmen are to give notice "to the owners of the land over which the same may pass." (Comp. Stat., ch. 52, secs. 2 and 6.) So, if a proposed highway "may pass over lands not in any town, the court shall order notice to be given to the owner thereof." (Comp. Stat.,

ch. 53, sec. 3.) In *Kennett's Petition*, 24 N. H., 139, the court (per Bell, J.,) said: "Upon examination of the Revised Statutes we can find no provision for the allowance of damages to any persons but the owners of lands over which the new highway is laid." See, also, *People ex rel. Newton* v. *Supervisors of Oneida County*, 19 Wendell, 102. No "owner," then, can claim damages under the statute, unless some portion of his land is crossed by the road. If only the owner whose land is crossed can claim damages, it would seem that the legislature intended that the damages to be awarded to him should be confined to the injuries occasioned by the crossing of his own land. It is solely by reason of such crossing that the statute gives him any right to have damages appraised by the selectmen at all. The statute, as construed in *Kennett's Petition*, reads thus: "Those persons, and those only, whose land is actually crossed by the road, are entitled to have their damages assessed by the selectmen." Damages, how sustained? Damages, for what? The natural answer is, the damages occasioned by the doing of the act which gives them a right to claim damages — namely, the building of the road over their own land. The language of the statute is broad enough to include actionable damage to the remaining land of an owner by reason of the building of the road over a portion of his land (see *Dearborn* v. *B. C. & M. R. R.*, 24 N. H., 179, pp. 185–187); but we think it does not include damages caused to him by the building of the road over the land of another.

If it be conceded that the legislature ought to have provided for the assessment of such damages, this undoubtedly presents a consideration to be weighed in determining the meaning of their language, but it does not absolutely necessitate the conclusion that they have made such provision. "It is only in case of some reasonable doubt of the meaning of the legislature, founded in the language of the act," that such a consideration can control the court in its construction. And the omission to provide for this case does not necessarily involve the imputation that the legislature deliberately intended to transcend their constitutional power. It is not altogether improbable that the contingency that any damage might occur to a land-owner from the construction of the road over the land of another was not contemplated by the legislature. (See Kent, Chan., in *Gardner* v. *Village of Newburgh*, 2 Johns. Ch., 162, p. 168.) The early legislation on the subject of railroads was imperfect. (See Redfield, C. J., in 25 Vermont, p. 58.) Or if the contingency did occur to the legislature as possible, they might have supposed that it would result in only a few cases, and that it would be better, in those exceptional instances, to leave the corporation exposed to liability in a common-law action, than to attempt the very difficult task of estimating such damages prior to the construction of the road. It is comparatively easy to estimate the prospective damages which will be occasioned to a lot of land by the building of a railroad over that lot. But it is quite a different matter to estimate the probable damage which will be caused to that lot by the construction of the road over numerous lots belonging to other persons, many of them situated at a considerable distance. The judgment of the appraisers on such a question would be extremely likely to be at fault. After a road is built, actual occurrences will afford more certain data for such an estimate. But the damages awarded under the statute are ordinarily to be assessed and paid before the making of the road. (Comp. Stat., ch. 150, secs. 16 and 17.)

An estimate of such damages, made prior to the building of the road, but conclusive upon the parties for all coming time, would often fail to even approximate to correctness.

Decisions in other jurisdictions, upon the construction of statutes differing in phraseology from our own, are not in point. (See *Indiana Central R. R. Co.* v. *Boden*, 10 Indiana, 96; *Wabash & Erie Canal* v. *Spears*, 16 Indiana, 441; Davison, J., in *Evansville & Crawfordsville R. R. Co.* v. *Dick*, 9 Indiana, 433; p. 435; Green, C. J., in *Delaware & Raritan Canal Co.* v. *Lee*, 2 Zabriskie, 243, p. 249; *Regina* v. *Eastern Counties Railway*, 2 Queen's Bench, 347; *Dodge* v. *Com'rs*, 3 Metcalf, 380; *Whitehouse* v. *Androscoggin R. R. Co.*, 52 Maine, 208; *Parker* v. *B. & Me. R. R.*, 3 Cush., 107.) If the construction of the statute in question has not already been settled adversely to the plaintiff by a decision in this State, the court are unanimously of opinion that the statute should be construed as not authorizing an appraisal of the damages covered by the ruling in this case, and that the appraisal consequently does not bar the action. I am not prepared to say that the decision in *Concord R. R.* v. *Greely*, 23 N. H., 237, is not an authority for the defendants on this point; but no other member of the court is inclined to regard it in that light, and it is therefore unnecessary to consider whether, if it were held to be in point, the court ought to go to the length of overruling it. (As the decision in *Concord R. R.* v. *Greely* was not made until December, 1851, it seems that it could not have affected the appraisal in question.) It is satisfactory to know that our view that these damages were not included in the appraisal coincides with the contemporary understanding of the defendants. Of this, the language of the release affords conclusive evidence. It is obvious that the release does not include the damages in question; and it is equally obvious that the corporation could not have thought it worth while to take a release from the plaintiff which covered less than they understood to be included in the award.

The defendants' first position is, that the plaintiff has already received compensation for this damage. This position the court have now overruled. The defendants' next position is, that the plaintiff is not legally entitled to receive any compensation, but is bound to submit to the infliction of this damage without any right of redress. The argument is not put in the precise words we have just used, but that is what we understand them to mean. The defendants say that the legislative charter authorized them to build the road, if they did it in a prudent and careful manner; that they constructed the road at the cut with due care and prudence; and that they cannot be made liable as tort-feasors for doing what the legislature authorized them to do. This involves two propositions; first, that the legislature have attempted to authorize the defendants to inflict this injury upon the plaintiff without making compensation; and second, that the legislature have power to confer such authority. There are decisions which tend to show that the charter should not be construed as evincing any legislative intention to authorize this injury, or to shield the defendants from liability in a common-law action. (*Tinsman* v. *Belvidere, Delaware R. R. Co.*, 2 Dutcher, N. J., 148; *Simmckson* v. *Johnson*, 2 Harr., N. J., 129; *Hooker* v. *New Haven & Northampton Co.*, 14 Conn., 146; *Fletcher* v. *Auburn & Syracuse R. R. Co.*, 25 Wendell, 462; *Brown* v. *Cayuga & Susquehanna R. R. Co.*, 12 N. Y. (2 Kernan), 486, p. 491; see, also, *Eastman* v. *Company*, 44 N. H., 143, p. 160; *Hooksett* v. *Company*, 44 N. H.,

105, p. 110; *Company* v. *Goodale*, 46 N. H., 53, p. 57; Barrows, J., in *Lee* v. *Pembroke Iron Co.*, 57 Maine, 481, p. 488.) But we propose to waive inquiry on this point, and to consider only the correctness of the second proposition, or, in other words, the question of legislative power.

The defendants cannot claim protection under an implied power, where an express power would be invalid: the legislature cannot do indirectly what they cannot do directly. Unless an express provision in the charter, authorizing the infliction of this injury without making compensation, would be a valid exercise of legislative power, the defendants cannot successfully set up the plea that the injury was necessarily consequent upon the exercise of their chartered powers, and therefore impliedly authorized. The defence, then, really presents this question: Has the legislature power to authorize the railroad corporation to divert the waters of the river, by removing a natural barrier, so as to cause the waters "sometimes in floods and freshets" to flow over the plaintiff's land, "carrying sand, gravel, and stones" upon his farm, without making any provision for his compensation?

Although the Constitution of this State does not contain, in any one clause, an express provision requiring compensation to be made when private property is taken for public uses, yet it has been construed by the courts, in view of the spirit and tenor of the whole instrument, as prohibiting such taking without compensation; and it is understood to be the settled law of the State, that the legislature cannot constitutionally authorize such a taking without compensation. (*Piscataqua Bridge* v. *N. H. Bridge*, 7 N. H., 35, pp. 66, 70; Perley, C. J., in *Petition of Mount Washington Road Co.*, 35 N. H., 134, pp. 141, 142; Sargent, J., in *Eastman* v. *Amoskeag Manuf. Co.*, 44 N. H., 143, p. 160; *State* v. *Franklin Falls Co.*, 49 N. H., 240, p. 251.) The counsel for the defendants have not been understood to question the correctness of this interpretation of the Constitution.

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiff's property, within the constitutional meaning of those terms. It might seem that to state such a question is to answer it; but an examination of the authorities reveals a decided conflict of opinion. The constitutional prohibition (which exists in most, or all, of the States) has received, in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read, "No person shall be divested of the formal title to property without compensation, but he may, without compensation, be deprived of all that makes the title valuable." To constitute a "taking of property," it seems to have sometimes been held necessary that there should be "an exclusive appropriation," "a total assumption of possession," "a complete ouster," an absolute or total conversion of the entire property, "a taking the property altogether." These views seem to us to be founded on a misconception of the meaning of the term "property," as used in the various State Constitutions.

In a strict legal sense, land is not "property," but the subject of property. The term "property," although in common parlance frequently applied to a tract of land or a chattel, in its legal signification "means only the rights of the owner in relation to it." "It denotes a right . . . . over a determinate thing." "Property is the right of any person to possess, use, enjoy, and dispose of a thing." Seldon, J., in *Wynehamer* v. *The*

People, 13 N. Y., 378, p. 433; 1 Blaekstone Com., 138; 2 Austin on Jurisprudenee, 3d ed., 817, 818. If property in land eonsists in eertain essential rights, and a physieal interferenee with the land substantially subverts one of those rights, sueh interferenee "takes," *pro tanto*, the owner's "property." The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. "Use is the real side of property." This right of user neeessarily includes the right and power of exeluding others from using the land. (See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in *Walker* v. *O. C. W. R. R.*, 103 Mass., 10, p. 14.) From the very nature of these rights of user and of exelusion, it is evident that they eannot be materially abridged without, *ipso facto*, taking the owner's "property." If the right of indefinite user is an essential element of absolute property or complete ownership, whatever physieal interferenee annuls this right, takes "property,"—although the owner may still have left to him valuable rights (in the artiele) of a more limited and eircumscribed nature. He has not the same property that he formerly had. Then, he had an unlimited right; now, he has only a limited right. His absolute ownership has been reduced to a qualified ownership. Restricting A.'s unlimited right of using one hundred acres of land to a limited right of using the same land, may work a far greater injury to A. than to take from him the title in fee simple to one aere, leaving him the unrestrieted right of using the remaining ninety-nine aeres. Nobody doubts that the latter transaetion would eonstitute a "taking of property." Why not the former?

If, on the other hand, the land itself be regarded as "property," the praetieal result is the same. The purpose of this constitutional prohibition cannot be ignored in its interpretation. The framers of the Constitution intended to protect rights whieh are worth protecting; not mere empty titles, or barren insignia of ownership, whieh are of no substantial value. If the land, "in its eorporeal substanee and entity," is "property," still, all that makes this property of any value is the aggregation of rights or qualities whieh the law annexes as incidents to the ownership of it. The constitutional prohibition must have been intended to proteet all the essential elements of ownership whieh make "property" valuable. Among these elements is, fundamentally, the right of user, including, of course, the corresponding right of exeluding others from the use. (See Comstoek, J., in *Wyñehamer* v. *The People*, 13 N. Y., 378, p. 396. A physieal interference with the land, which substantially abridges this right, takes the owner's "property" to just so great an extent as he is thereby deprived of this right. "To deprive one of the use of his land is depriving him of his land;" for, as Lord Coke said, "What is the land but the profits thereof?" (Sutherland, J., in *People* v. *Kerr*, 37 Barb., 357, p. 399; Co. Litt., 4 *b*.) The private injury is thereby as eompletely effeeted as if the land itself were "physieally taken away."

The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it; although the amount or value of the property taken in the two instanees may widely differ. If the railroad corporation take a strip four rods wide out of a farm to build their traek upon, they eannot escape paying for the strip by the plea that they have not taken the whole farm. So a partial, but substantial, restriction of the right of user may not annihilate all the owner's rights of

property in the land, but it is none the less true that a part of his property is taken. Taking a part "is as much forbidden by the Constitution as taking the whole. The difference is only one of degree; the quantum of interest may vary, but the principle is the same." (See 6 Am. Law Review, 197, 198; Lawrence, J., in *Nevins* v. *City of Peoria*, 41 Illinois, 502, p. 511.) The explicit language used in one clause of our Constitution indicates the spirit of the whole instrument. "No part of a man's property shall be taken . . . . . ." Constitution of N. H., Bill of Rights, Article 12. The opposite construction would practically nullify the Constitution. If the public can take part of a man's property without compensation, they can, by successive takings of the different parts, soon acquire the whole. Or, if it is held that the complete divestiture of the last scintilla of interest is a taking of the whole for which compensation must be made, it will be easy to leave the owner an interest in the land of infinitesimal value.

The injury complained of in this case is not a mere personal inconvenience or annoyance to the occupant. Two marked characteristics distinguish this injury from that described in many other cases. First, it is a physical injury to the land itself, a physical interference with the rights of property, an actual disturbance of the plaintiff's possession. Second, it would clearly be actionable if done by a private person without legislative authority. The damage is "consequential," in the sense of not following immediately in point of time upon the act of cutting through the ridge, but it is what Sir William Erle calls "consequential damage to the actionable degree." (See *Brand* v. *H. & C. R. Co.*, Law Reports, 2 Queen's Bench, 223, p. 249.) These occasional inundations may produce the same effect in preventing the plaintiff from making a beneficial use of the land as would be caused by a manual asportation of the constituent materials of the soil. Covering the land with water, or with stones, is a serious interruption of the plaintiff's right to use it in the ordinary manner. If it be said that the plaintiff still has his land, it may be answered, that the face of the land does not remain unchanged, and that the injury may result in taking away part of the soil ("and if this may be done, the plaintiff's dwelling-house may soon follow"); and that, even if the soil remains, the plaintiff may, by these occasional submergings, be deprived of the profits which would otherwise grow out of his tenure. "His dominion over it, his power of choice as to the uses to which he will devote it, are materially limited." (Brinkerhoff, J., in *Reeves* v. *Treasurer of Wood County*, 8 Ohio St., 333, p. 346.)

The nature of the injury done to the plaintiff may also be seen by adverting to the nature of the right claimed by the defendants. The primary purpose of the defendants in cutting through the ridge was to construct their road at a lower level than would otherwise have been practicable. But, although the cut was not made "for the purpose of conducting the water in a given course" on the plaintiff's land, it has that result; and the defendants persist in allowing this excavation to remain, notwithstanding the injury thereby visibly caused to the plaintiff. Rather than raise the grade of their track, they insist upon keeping open a canal to conduct the flood-waters of the river directly on to the plaintiff's land. If it be said that the water came naturally from the southerly end of the cut on to the plaintiff's land, the answer is, that the water did not come naturally to the southerly end of the cut. It came there by reason

of the defendants having made that cut. In consequence of the cut, water collected at the southerly boundary of the ridge, north of the plaintiff's farm, which would not have been there if the ridge had remained in its normal and unbroken condition. They have "so dealt with the soil" of the ridge, that, if a flood came, instead of being held in check by the ridge, and ultimately getting away by the proper river channel without harm to the plaintiff, it flowed through where the ridge once was on to the plaintiff's land. "Could the defendants say they were not liable because they did not cause the rain to fall," which resulted in the freshet; or because the water "came there by the attraction of gravitation?" (See Bramwell, Baron, in *Smith* v. *Fletcher*, Law Reports, 7 Excheq., 305, p. 310.) If the ridge still remained in its natural condition, could the defendants pump up the flood-water into a spout on the top of the ridge, and thence, by means of the spout, pour it directly on to the plaintiff's land? If not, how can they maintain a canal through which the water by the force of gravitation will inevitably find its way to the plaintiff's land? (See Ames, J., in *Shipley* v. *Fifty Associates*, 106 Mass., 194, pp. 199, 200; Chapman, C. J., in *Salisbury* v. *Herchenroder*, 106 Mass., 458, p. 460.) To turn a stream of water on to the plaintiff's premises is as marked an infringement of his proprietary rights as it would be for the defendants to go upon the premises in person and "dig a ditch, or deposit upon them a mound of earth." (See Lawrence, J., in *Nevins* v. *City of Peoria*, 41 Illinois, 502, p. 510; Dixon, C. J., in *Pettigrew* v. *Village of Evansville*, 25 Wisconsin, 223, pp. 231, 236.) The defendants may, perhaps, regret that they cannot maintain their track at its present level without thereby occasionally pouring flood-water on to the land of the plaintiff. Indeed, the passage of this water through the cut may cause some injury to the defendants' road-bed. But the advantages of maintaining the track at the present grade outweigh, in the defendants' estimation, the risk of injury by water to themselves and to the plaintiff. In asserting the right to maintain the present condition of things as to the cut, the defendants necessarily assert the right to produce all the results which naturally follow from the existence of the cut. In effect, they thus assert a right to discharge water on to the plaintiff's land. Such a right is an easement. A right of "occasional flooding" is just as much an easement as a right of "permanent submerging;" it belongs to the class of easements which "are by their nature intermittent — that is, usable or used only at times." (See Goddard's Law of Easements, 125.) If the defendants had erected a dam on their own land across the river below the plaintiff's meadow, and by means of flash-boards thereon had occasionally caused the water to flow back and overflow the plaintiff's meadow so long and under such circumstances as to give them a prescriptive right to continue such flowage, the right thus acquired would unquestionably be an "easement." The right acquired in that case does not differ in its nature from the right now claimed. In the former instance, the defendants flow the plaintiff's land by erecting an unnatural barrier below his premises. In the present instance, they flow his land by removing a natural barrier on the land above his premises. In both instances, they flow his land by making "a non-natural use" of their own land. In both instances, they do an act upon their own land, the effect of which is to restrict or burden the plaintiff's ownership of his land (see *Leconfield* v. *Lonsdale*, Law Reports, 5 Com.

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